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APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-811

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA, ET AL.,
Petitioners

—*v.*—

ROOSEVELT F. PALMORE

C. L. SWAIN, SUPERINTENDENT, LORTON REFORMATORY,
Petitioner

—*v.*—

JASPER C. PRESSLEY

ON WRITS OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR WRITS OF CERTIORARI FILED DECEMBER 5, 1975
CERTIORARI GRANTED FEBRUARY 23, 1976

In the Supreme Court of the United States

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INDEX*

Page

I. *Superior Court of the District of Columbia, et al.* v. *Palmore:*

Relevant Docket Entries 1

Application for Writ of Habeas Corpus 3

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* A copy of the opinions of the United States Court of Appeals for the District of Columbia Circuit were filed as Appendix A and D to the petition for a writ of certiorari (pp. 1a-52a and 57a-63a). The judgments of the court of appeals were reproduced as Appendices B and E to the petition. The order of the United States District Court discharging the rule to show cause and dismissing the petition in the *Palmore* case is reproduced as Appendix C. The order and the memorandum of the United States Court discharging the rule to show cause and dismissing the petition in the *Pressley* case are reproduced as Appendices F and G.

Page

Applicant's Memorandum of Points and Authorities in Support of Application for a Writ of Habeas Corpus 8

Order Directing Respondent to Show Cause 27

Return and Answer to Order to Show Cause and Memorandum of Law 28

Petitioner's Supplemental Memorandum 43

Appellant's Motion for Leave to Amend Jurisdictional Allegations 47

Opposition to Appellant's Motion for Leave to Amend Jurisdiction Allegations 51

Order Granting Motion for Leave to Amend Jurisdictional Allegations 57

Applicant's Amended Jurisdictional Allegations 58

II. *Swain* v. *Pressley:*

Relevant Docket Entries 60

Petition for Issuance of Writ of Habeas Corpus 62

Order Authorizing Filing and Directing Respondent to Show Cause 70

Answer to Petition for Writ of Habeas Corpus and Rule to Show Cause 71

Supplemental Return and Answer to Rule to Show Cause..... 74

Reply of Petitioner 77

Answer to the Reply of Petitioner (Not including the Memorandum of Law, which is the same as filed in the *Palmore* case) 93

Transcript of Hearing on Writ of Habeas Corpus held on July 16, 1973, before Honorable Gerhard A. Gesell 96

The Judgment of the District of Columbia Court of Appeals in *Pressley* v. *United States*, No. 6063, dated May 22, 1972.. 109

The Judgment of the District of Columbia Court of Appeals in *Pressley* v. *United States*, No. 6631, dated March 2, 1973 111

The Judgment of the District of Columbia Court of Appeals in *Pressley* v. *United States*, No. 6803, dated July 6, 1973.. 114

III. *Order in respect to both cases:*

The Order allowing Certiorari 116

I. *Superior Court of the District of Columbia, et al.* v. *Palmore*

RELEVANT DOCKET ENTRIES

Date	Entries	Judge
May 15, 1973	Application for Writ of Habeas Corpus; P & A's; Appendix	
	• • • •	
May 16, 1973	Order directing respondent to show cause on or before the 10th day after service	Judge McGuire
May 16, 1973	Rule to show cause & copies issued; ser: 5/18/ on #2 & #3 #1 5-25-73	
	• • • •	
June 4, 1973	Return and answer of respondents to show cause; memorandum of Law; c/m 6-4-73; Exh. Appearance Harold H. Titus, Jr. and Craig M. Bradley, U.S. Attorney's Office.	
June 7, 1973	Order setting hearing on Rule to Show Cause for June 18, 1973 at 9:30	Judge Sirica
	• • • •	
June 8, 1973	Order granting petitioner's motion to continue bail pending appeal.	Judge Sirica
June 15, 1973	Reply Memorandum by petitioner p/s 6/15/73.	
June 21, 1973	Supplemental Memorandum of petitioner; p/s 6/21/73.	
Jul. 13, 1973	Further Supplemental Memorandum of Petitioner; Exhibit; p/s 7/13/73.	
Jul. 16, 1973	Appearance of Thomas G. Krattenmaker entered as co-Counsel for petitioner.	
Jul. 15, 1974	ORDER discharging rule to show cause and dismissing petition (signed 7/10/74)	Judge Waddy

Date	Entries	Judge
Jul. 17, 1974	NOTICE of appeal by petitioner from order of July 15, 1974. Copy to U.S. Att.	Judge Waddy
	* * * *	
July 31, 1975	Certified copy of judgment USCA reversing and remanding cause to U.S. District Court. Opinion attached.	
Aug. 1, 1975	Transmittal sheet U.S.C.A. returning original record to U.S.D.C.	
Aug. 8, 1975	Report and recommendation of Mag. Margolis.	
	* * * *	
Sept. 3, 1975	AMENDED Jurisdictional Allegations by applicant; attachment; c/s 9-3-75.	
	* * * *	

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Habeas Corpus No. 31-73

[Filed May 15, 1973, James F. Davey, Clerk]

ROOSEVELT F. PALMORE,
1880 South Addison Road,
District Heights, Maryland, APPLICANT

v.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA,
Fifth and E Streets, N.W.,
Washington, D.C.,

THE ATTORNEY GENERAL OF THE UNITED STATES,
United States Department of Justice,
Washington, D.C.,

and

DIRECTOR, DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS,
614 H Street, N.W.,
Washington, D.C., RESPONDENTS

APPLICATION FOR WRIT OF HABEAS CORPUS

Roosevelt F. Palmore respectfully applies for the issuance of a writ of habeas corpus and in support thereof alleges and represents as follows:

1. Applicant is a citizen of the United States and is now in custody under the authority of the United States of America, and for an act done or omitted pursuant to an Act of Congress, and in violation of the Constitution of the United States.

2. Applicant is presently in the custody of the Superior Court of the District of Columbia and the judges and officers thereof. As more fully alleged herein, applicant will shortly be in the custody of either the Attorney General of the United States and his subordinates, or the Director of the District of Columbia Department of Corrections and his subordinates, or both.

3. This Court has jurisdiction to entertain this application and issue the writ of habeas corpus as prayed herein pursuant to 28 U.S.C. §§ 2241 *et seq.* Jurisdiction is also invoked under and by virtue of Article I, § 9, cl. 2 and Article III of the Constitution of the United States and 28 U.S.C. § 1651.

4. On April 27, 1971, the Superior Court of the District of Columbia entered a judgment convicting applicant of the crime of carrying a dangerous weapon in violation of D.C. Code § 22-3204, and sentencing him to imprisonment for not less than two years, nor more than six years. Execution of the sentence was suspended, except for six months, and applicant was placed on probation for six years. The aforesaid judgment does not state the name or title of the person having custody of applicant.

5. Applicant commenced service of the aforesaid sentence on April 27, 1971, and was incarcerated in the custody of either the Attorney General of the United States, or the Director of the District of Columbia Department of Corrections, or both, for a period of thirty seven days when, by further order, the Superior Court of the District of Columbia admitted applicant to bail pending appeal. At the time this application is filed, applicant is in custody pursuant to the order of the Superior Court admitting him to bail pending appeal.

6. On April 28, 1972, the District of Columbia Court of Appeals entered a judgment affirming applicant's conviction, but thereafter that court stayed transmittal of its mandate pending review by the Supreme Court of the United States.

7. On April 24, 1973, the Supreme Court of the United States granted, in part, applicant's petition for a writ of certiorari and affirmed the judgment of the District of Columbia Court of Appeals. The Supreme Court denied applicant's petition for writ of certiorari with respect to the constitutional claim raised by this application.

8. The sole evidence against applicant was obtained by police officers in violation of applicant's right to be

free from unreasonable searches and seizures under the Fourth Amendment to the Constitution of the United States in that:

(a) while applicant was violating no law, police officers, acting without probable cause to believe that an offense had been, was being, or was about to be, committed and also acting without a suspicion having an articulate basis in fact to warrant the intrusion, selected applicant for a "spot check," forced his automobile to the side of the road, and detained applicant pending completion of the "spot check";

(b) among other things, the purpose of the "spot check" was to investigate suspicious persons and to complete investigative forms prepared by a division of the Metropolitan Police Department and to see if applicant had committed a crime;

(c) during the aforesaid "spot check", but well after the point in time when the police officers had forced applicant to the side of the road and detained him, a gun was seized by the officers from applicant's automobile;

(d) the gun which the officers seized as aforesaid was admitted into evidence at applicant's trial before the Superior Court of the District of Columbia over applicant's Fourth Amendment objection.

9. The Superior Court of the District of Columbia and the District of Columbia Court of Appeals have each denied applicant relief from the violation of applicant's right to be free from unreasonable seizures and searches in accordance with the Fourth Amendment to the Constitution.

10. No judge or court of the United States has determined the legality of applicant's detention on the grounds set forth herein, either on prior application for writ of habeas corpus or otherwise.

11. Applicant is now in custody and restrained of his liberty by virtue of the order of the Superior Court of the District of Columbia admitting him to bail pending appeal. On information and belief, the mandate of the Supreme Court of the United States will issue on

or about May 19, 1973, and the mandate of the District of Columbia Court of Appeals will issue on or about May 21, 1973. Thereafter, and on or about May 22, 1973, applicant will be returned to the custody of the Attorney General of the United States or the Director of the District of Columbia Department of Corrections, or both, pursuant to the judgment of conviction entered by the Superior Court of the District of Columbia.

12. Both the aforesaid order of the Superior Court of the District of Columbia admitting applicant to bail pending appeal and the judgment of conviction of that court are in violation of the Fourth Amendment to the Constitution of the United States.

WHEREFORE, this application should be granted and a writ of habeas corpus should issue.

/s/ Frank F. Flegal
FRANK F. FLEGAL
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
(624-8208)

Attorney for Applicant

May 15, 1973

VERIFICATION

DISTRICT OF COLUMBIA: ss.

ROOSEVELT F. PALMORE, being duly sworn, deposes and says that he has read the foregoing application for a writ of habeas corpus and that the factual statements, allegations and representations set forth therein are true and complete.

/s/ Roosevelt F. Palmore
ROOSEVELT F. PALMORE

Subscribed and sworn to before me this 15th day of May, 1973.

/s/ Anna M. Snow
Notary Public

Comm. Exp. 5/14/77

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Habeas Corpus No. 31-73

[Filed May 15, 1973, James F. Davey, Clerk]

ROOSEVELT F. PALMORE, APPLICANT

v.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA, *et al.*, RESPONDENTS

APPLICANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF APPLICATION FOR A WRIT OF HABEAS CORPUS

Preliminary Statement

Applicant seeks issuance of a writ of habeas corpus on the ground that the order and judgment of conviction which constitute the basis for the restraint of applicant's liberty are in violation of the Fourth Amendment to the Constitution. Two issues are presented for the Court's determination. First, the threshhold question of jurisdiction to entertain this application. Second, assuming jurisdiction, the merits of applicant's Fourth Amendment claim. We address these issues *seriatim* after first setting forth the pertinent facts.[1]

The Facts

Resolution of the jurisdictional issues does not require a detailed statement of the facts. Thus, for the Court's convenience, we first set forth a summary of the

[1] As an appendix to this memorandum, applicant has annexed a copy of the printed record filed with the Supreme Court of the United States. This record was designated and filed pursuant to agreement between applicant's counsel and the Solicitor General of the United States in accordance with the Rules of the Supreme Court and contains all portions of the local court record pertinent to the issues raised here.

pertinent developments in the case sufficient to permit full consideration of the question of jurisdiction. Thereafter, as necessary for disposition of applicant's Fourth Amendment claim, we detail the pertinent facts reflected in the local court record.

A. *Summary of the Case.* On February 23, 1971, a grand jury returned an indictment in the Superior Court of the District of Columbia charging applicant with carrying a dangerous weapon, a gun, in violation of D.C. Code § 22-3204. Prior to trial, applicant moved the Superior Court to dismiss the indictment contending that only a court ordained and established in accordance with Article III of the Constitution had jurisdiction to hear and determine the charge against him (R.[2] 4). Applicant also moved for an order suppressing as evidence a gun, and all testimony pertaining thereto, on the ground that his Fourth Amendment right to be free from unreasonable searches and seizures had been violated by police officers in obtaining that gun (R. 5). The Superior Court denied both motions (R. 8-11, 42-43), found applicant guilty of the charge set forth in the indictment (R. 47), and thereafter imposed sentence and entered its judgment of conviction (R. 50).

Applicant perfected an appeal to the District of Columbia Court of Appeals. On April 28, 1972, that court affirmed the judgment of the Superior Court, expressly passing on both of the constitutional issues which applicant had raised in the trial court. *Palmore* v. *United States*, 290 A.2d 573 (D.C. App. 1972) (R. 52-68).

Applicant sought review in the Supreme Court of the United States invoking alternatively that Court's appellate jurisdiction pursuant to 28 U.S.C. § 1257(2) and its certiorari jurisdiction pursuant to 28 U.S.C. § 1257(3). On April 24, 1973, the Supreme Court held that it lacked appellate jurisdiction but granted a writ of certiorari limited to applicant's claim under Article III of the Constitution. *Palmore* v. *United States*, —— U.S. ——, 41 L.W. 4528, 4529-4530. That contention

[2] The abbreviation "R." refers to the record annexed to this memorandum as an appendix. See *supra*, p. 1 n.1.

is, of course, foreclosed and is not pressed here. The Supreme Court, however, expressly declined to pass on applicant's claim under the Fourth Amendment to the Constitution, denying the petition for writ of certiorari on that issue. *Palmore* v. *United States, supra,* 41 L.W. at 4530 n.6. That is the sole issue raised in this application for writ of habeas corpus and the threshhold issue thus turns on this Court's jurisdiction to entertain this application under these circumstances.

B. *The Facts.*[3] On January 16, 1971, Officers Busker and Morrissette were assigned to the Special Operations Division ("S.O.D.") of the Metropolitan Police Department, working in casual clothes in an unmarked police vehicle (R. 12). About 8:00 p.m. that evening, these officers were parked at the curb near Vermont and Florida Avenues, N.W., when they observed applicant drive by in an automobile (R. 19-20). Applicant had violated no law or traffic regulation, there was no apparent equipment defect on his automobile, the officers had received no word that this vehicle was reported stolen, and the officers had no other factual basis to believe that applicant was engaged in criminal activity (R. 61-62, 35).[4]

Noting that the automobile had Virginia rental "tags" (R. 12), the officers decided to stop applicant for a "spot check" (R. 18, 35)[5] pursuant to instructions given

[3] The facts set forth herein are taken solely from the local court record. Although applicant and his witness gave a different version of the events than did the police officers, the trial court believed the officers (R. 43). We do not ask this court to pass upon credibility in this habeas corpus proceeding. Rather, we have confined our statement of the facts to the testimony of the police officers, *i.e.*, the Government's version of the facts.

[4] Both the District of Columbia Court of Appeals (290 A.2d at 581; R. 61-62) and the Supreme Court of the United States (41 L.W. at 4528) made findings on this point. The Government has never contended otherwise.

[5] A "spot check," also referred to interchangeably as a "traffic check" (R. 25), consists of stopping a vehicle and demanding that the operator produce for inspection his driver's license and registration certificate (R. 18, 38). During a "spot check," special forms are completed and returned to the S.O.D. for departmental use (R. 35-36).

them by their superiors (R. 19, 35). Officer Busker, the senior officer (R. 39) who decided to make the "spot check" (R. 14, 20), had never received instructions as to the basis by which he was to select a particular vehicle for a "spot check," and he believed that "this is left up to each individual officer" (R. 19). While his reason for stopping a particular automobile varies at "a given time" (R. 19), Officer Busker frequently stops rented automobiles and had been doing so for "over a year" when this case was tried in the Superior Court (R. 22). Officer Busker stops rented automobiles because:

> ". . . a lot of these care are rented, and are not taken back on time, and on other occasions I have personally known where an officer stopped a rental car and got about $6,000 worth of dope out of the car" (R. 21).

Officer Busker is concerned about overdue rental cars because, in his view, "it's a criminal charge" to operate a rental car with an overdue agreement (R. 26), and he thus conducts "spot checks" so that "the man driving can prove that it's his car" (R. 25).

A special form had been prepared by S.O.D. for its officers to complete when "spot checks" are made (R. 35). This form, which is not a numbered police department form (R. 36), is handed in at the conclusion of an officer's duty and lists "the information that the department would like" including "the name, the address of the person driving, the color of the vehicle, the tag number, the driver's permit number, and the color, the number of occupants in it" (R. 35-36).

Pursuant to this "spot check" policy, the officers forced applicant to the side of the road (R. 20, 22, 29, 30) after advising a second unmarked police car manned by two other plainclothes officers of their intentions (R. 29, 38-39). Applicant stopped his car, got out of the vehicle, and walked toward Officer Busker (R. 14), who asked applicant to produce his driver's license and rental agreement form (R. 15). Applicant immediately produced a valid driver's license (R. 15) and returned

to the automobile to obtain the rental form which was in the glove compartment (R. 15). During this time, applicant was not free to refuse the officers' request and drive away (R. 28).

Applicant's rental form bore an expiration date several days earlier, and the officer engaged applicant in a conversation lasting a minute or two "about the rental agreement" (R. 18, 23). While Officer Busker and applicant were engaged in this conversation, Officer Morrissette stationed himself on the passenger side of the automobile in order to "protect" his partner (R. 38). He was "observing everything that might be inside the car" (R. 37) because there might be "numerous things in the glove compartment that [applicant] could be charged with" (R. 40). By shining his flashlight beam into the car (R. 32) and by bending [his] torso (R. 37), Officer Morrissette observed "the hammer mechanism" of a gun under the lowered armrest (R. 32). He notified Officer Busker of his discovery, and applicant was placed under arrest (R. 18, 32-33).

The Superior Court denied applicant's motion to suppress as evidence the gun, and testimony relating thereto, holding that the "spot check" procedure revealed by this record was not "unreasonable even under the Fourth Amendment to the Constitution" (R. 42). The District of Columbia Court of Appeals agreed (R. 61-66).

ARGUMENT

I

THIS COURT HAS JURISDICTION TO ISSUE THE WRIT

The jurisdictional inquiry involves two separate considerations. First, is the applicant in "custody" within the meaning of 28 U.S.C. § 2241?[6] Second, is this Court

[6] Since the District of Columbia is not a "state" absent a clear Congressional intention to treat it as such in a particular circumstance, *Palmore* v. *United States*, —— U.S. ——, 41 L.W. 4528, 4529-4530 (1973); *District of Columbia* v. *Carter*, —— U.S. ——,

possessed of jurisdiction to issue a writ of habeas corpus on application of one convicted by the local District of Columbia courts after the applicant has unsuccessfully sought vindication of a constitutional[7] claim in the local courts? For reasons which follow, we submit that both questions must be answered affirmatively.

It is, of course, fundamental that the writ will issue only on the application of one in "custody." At the time this application was filed, applicant was enlarged on bail pending appeal from the judgment of conviction entered by the Superior Court. That status constitutes "custody" within the meaning of habeas corpus statutes. Hensley v. Municipal Court, —— U.S. ——, 41 L.W. 4513 (1973). Absent intervention by this Court,[8] applicant will shortly be subject to either actual incarceration or an extended period of probation. That status, like applicant's present status, also constitutes "custody" for purposes of the habeas corpus statutes. *Jones* v. *Cunningham*, 371 U.S. 236 (1963); *Stolte* v. *Laird*, 353 F. Supp. 1392, 1395 (D.D.C. 1972) (Robinson, J.). It is thus clear that applicant meets the "custody" requirement for habeas corpus relief.

Putting to one side for a moment any *sui generis* problems which may have been created by the reorganization of the courts in the District of Columbia, it is also clear that applicant has satisfied the standard exhaustion requirement which is a precondition to an applica-

93 S. Ct. 602, 604 (1973), we contend that the appropriate jurisdictional statute is 28 U.S.C. § 2241, not 28 U.S.C. § 2254 which pertains to state "custody." In any event, the "custody" test is the same under either statute. Cf. *Heflin* v. *United States*, 358 U.S. 415 (1959).

[7] This application tenders for decision only a Fourth Amendment claim which is clearly cognizable on application for habeas corpus by one held in either state or federal custody. *Kaufman* v. *United States*, 394 U.S. 217 (1969). There is thus no occasion to decide the availability of the writ when sought on a purely "local" issue.

[8] Applicant's present status pursuant to the bail order of the Superior Court will continue pending disposition of this application unless otherwise ordered by the Court. Rule 23(a), F.R.A.P. Thereafter, applicant's custody will turn on the disposition of this application in accordance with Rule 23(b), (c), F.R.A.P.

tion for habeas corpus. *Roberts* v. *LaVallee*, 389 U.S. 40 (1967); *Brown* v. *Allen*, 344 U.S. 443 (1953). As *Roberts* and *Brown* made clear, it is not necessary that an applicant for federal habeas corpus make a post-conviction application in the state courts if the applicant has already unsuccessfully urged the very point on a direct appeal in the state courts. The same principle is applied in federal custody cases. Cf. *Noyd* v. *Bond*, 395 U.S. 683 (1969); *Gusik* v. *Schilder*, 340 U.S. 128 (1950); *Parisi* v. *Davidson*, 405 U.S. 34 (1972).[9] Thus, unless the dual court system in the District of Columbia calls for a different jurisdictional rule, it is plain that the applicant satisfies all the jurisdictional and comity requirements of 28 U.S.C. § 2241.[10] We accordingly turn to an analysis of the District of Columbia statutes and considerations and demonstrate that these matters do not call for a different conclusion.

There are three separate statutory provisions of relevance to the jurisdictional inquiry. First, the general federal habeas corpus statute, 28 U.S.C. §§ 2241 *et seq.*, upon which we rely. Second, the local habeas corpus statute, D.C. Code § 16-1901. Finally, the local post-conviction relief statute, D.C. Code § 23-110. As we proceed to demonstrate, these statutes are not in conflict and support this Court's jurisdiction in the circumstances of this case.

---

[9] The cited federal custody cases illustrate the exhaustion principle as applied to military prisoners seeking habeas corpus in the federal civilian courts. See generally, Sherman, *Judicial Review of Military Determinations and the Exhaustion of Remedies Requirement*, 55 Va.L.Rev. 483 (1969). The same principles are applied when territorial prisoners seek federal habeas corpus. *E.g.*, *Maldonado* v. *Delgado*, 345 F. Supp. 993 (D.P.R. 1972).

[10] Applicant satisfies three separate jurisdictional requirements of an application for habeas corpus pursuant to 28 U.S.C. § 2241. First, applicant is "in custody under or by color of the authority of the United States" within the meaning of 28 U.S.C. § 2241(c)(1). *Benson* v. *Henkel*, 198 U.S. 1 (1905). Second, applicant is in custody "for an act done or omitted in pursuance of an Act of Congress" within the meaning of 28 U.S.C. § 2241(c)(2). *Palmore* v. *United States*, —— U.S. ——, 41 L.W. 4528, 4531, 4533, 4534 (1973). Finally, applicant "is in custody in violation of the Constitution * * * of the United States" within the meaning of 28 U.S.C. § 2241(c)(3). *Kaufman* v. *United States*, 394 U.S. 217 (1969).

First, it is obvious that this Court is a "district court" within the meaning of 28 U.S.C. § 2241. Congress has expressly defined the term "district court" to mean "the courts constituted by chapter 5 of [title 28, United States Code]." 28 U.S.C. § 451. This Court is a court constituted by chapter 5. 28 U.S.C. § 88. See *O'Donoghue* v. *United States*, 289 U.S. 516 (1933); *Palmore* v. *United States*, —— U.S. ——, 41 L.W. 4528, 4533 (1973). No provision of the District of Columbia Court Reform and Criminal Procedure Act of 1970, 84 Stat. 473 *et seq.*, purports to provide otherwise, or to amend the federal habeas corpus act so as to exclude this Court from the "district court[s]" vested with federal habeas corpus jurisdiction. It is therefore not necessary to grapple with the serious constitutional problems which would arise had Congress done so. See *infra*, pp. 12-13.

Second, D.C. Code § 16-1091, as amended by the Court Reorganization Act, § 145(h), 84 Stat. 560, vests this Court with jurisdiction to issue writs of habeas corpus "to Federal officers and employees" while conferring similar jurisdiction on the Superior Court with respect to writs "directed to any other person." This, we submit, is merely an illustration of the frequent situation where this Court has jurisdiction pursuant to two different statutes. Cf. *Graham* v. *Brotherhood of Locomotive Firemen*, 338 U.S. 232 (1949). A writ of habeas corpus may issue on grounds other than those specified in the general habeas corpus statutes, and in such a situation, the applicant must direct his application to the appropriate District of Columbia Court in accordance with D.C. Code § 16-1901. The fact that additional habeas corpus jurisdiction is vested by that statute does not preclude the exercise of general habeas corpus jurisdiction under 28 U.S.C. §§ 2241 *et seq.* See, *e.g.*, *Stewart* v. *Overholser*, 87 U.S.App.D.C. 402, 186 F.2d 339 (1951) (*en banc*); *Bland* v. *Rodgers*, 332 F. Supp. 989, 992 (D.D.C. 1971).

Finally, the local post-conviction statute, D.C. Code § 23-110, must be considered. That statute provides:

> "An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for

> relief by motion pursuant to this section shall not be entertained by the Superior Court or by any Federal or State court if it appears that the applicant has failed to make a motion for relief under this section or that the Superior Court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention." D.C. Code § 23-110(g).

There are two ways to read this confusing provision of law. First, the section may be read to mean that no federal court shall entertain an application for writ of habeas corpus involving a federal constitutional issue unless either (1) the applicant has exhausted his local post-conviction remedies or (2) the local courts have passed upon the constitutional claim and denied relief. This reading, the one for which we contend, presents no constitutional difficulties and comports with the general principles of exhaustion set forth in cases such as *Wilwording* v. *Swenson*, 404 U.S. 249 (1971); *Roberts* v. *LaVallee*, 389 U.S. 40 (1967); and *Brown* v. *Allen*, 344 U.S. 443 (1953). This reading comports with the sprace legislative history,[11] maintains a local-federal balance between the courts in the District of Columbia, extends full comity to the local courts, and preserves to the constitutional courts in the District of Columbia the "last say" on federal constitutional matters. *Palmore* v. *United States*, —— U.S. ——, 41 L.W. 4528, 4533 (1973); *Fay* v. *Noia*, 372 U.S. 391 (1963); *Kaufman* v. *United States*, 394 U.S. 217 (1969); *Brown* v. *Allen*, 344 U.S. 443, 508 (1953) (separate opinion of Frankfurter, J.); Bator and

[11] This section commanded only passing reference in the legislative reports. The Senate Report merely states: "Rather than relying on the inherent power of the superior court to review judgments of conviction, the new section provides statutory procedures for postconviction challenges. Section 23-110 is modeled upon 28 U.S.C. section 2255 with only the necessary technical changes." S. Rep.No. 91-405, 91st Cong., 1st Sess. at 38 (1969). The House Report is even more terse. H.R.Rep.No. 91-907, 91st Cong., 2d Sess. at 171 (1970). Neither in the legislative reports nor in the reported hearings and debates is there any suggestion that Congress intended to suspend the availability of the writ of habeas corpus from the federal constitutional courts.

Hart, *The Supreme Court, 1958 Term, Foreword: The Time Chart of the Justices*, 73 Harv. L. Rev. 84, 106-107 (1959).

The other reading of this section would always preclude a federal constitutional court from considering an application for writ of habeas corpus claiming denial of a federal constitutional right since it will always be the case that either (1) the applicant has remaining a post-conviction remedy in the local courts or (2) the local courts have rejected his constitutional claim and denied relief.[12] There are two reasons why, we submit, the Court should decline to adopt this reading of the statute.

First, this reading would make the District of Columbia the only place in the nation where a criminal defendant can never obtain a ruling on a federal constitutional issue from a federal constitutional court. The Supreme Court's recent opinion sharply points out the contrast between the non-constitutional local courts and the constitutional status of this Court. *Palmore* v. *United States*, —— U.S. ——, 41 L.W. 4528 (1973). In holding that Congress need not provide a constitutional court to hear and determine criminal charges against persons accused of violating a local criminal statute, the Supreme Court relied on the non-availability of a constitutional court in state criminal trials, 41 L.W. at 4528, 4532, in criminal trials before federal military tribunals, 41 L.W. at 4532, and in criminal trials before federal territorial courts, 41 L.W. at 4532. Yet, in each of these situations, vindication of federal constitutional claims in the constitutional courts by writ of habeas corpus is available.[13] As

[12] In *Bland* v. *Rogers*, 332 F. Supp. 989 (D.D.C. 1971), Judge Walsh was confronted with a unique third possibility, for in that case the local judge had denied an application "without prejudice." In those circumstances, Judge Walsh found jurisdiction under 28 U.S.C. § 2241 although he indicated, in dictum, that there would have been no jurisdiction had the local judge denied the application "with prejudice." 332 F. Supp. at 992.

[13] *E.g.*, *Fay* v. *Noia*, 372 U.S. 391 (1963) (state court defendant); *Burns* v. *Wilson*, 346 U.S. 137 (1953) (military defendant); *Stolte* v. *Laird*, 353 F. Supp. 1352 (D.D.C. 1972) (military defendant); *Maldonado* v. *Delgado*, 345 F. Supp. 993 (D.P.R. 1972) (defendant

we read the Supreme Court's opinion, the same is true in the District of Columbia, for the Court pointed out that "the position of the District of Columbia defendant is similar to that of the citizen of any of the 50 States when charged with violation of a state criminal law . . . ." *Palmore* v. *United States*, *supra*, 41 L.W. at 4528.[14] Thus it was that the Supreme Court, pointing out the distinction between the local courts and the constitutional courts within the District of Columbia, noted:

> ". . . the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit are constitutional courts manned by Art. III judges to which the citizens of the District must or *may resort for consideration of those constitutional and statutory matters of general concern . . . .*" *Palmore* v. *United States*, *supra*, 41 L.W. at 4533 (emphasis added).

That is precisely what applicant has done, seeking to avail himself of the right to seek federal habeas corpus which would be available in any other part of the nation. It ought to take more than an awkwardly worded sentence with no evidence of legislative intent to deprive him of the very fundamental privilege of the writ of habeas corpus.

There is a further reason why § 23-110(g) should not be construed to preclude habeas corpus jurisdiction in the constitutional courts, for it is fundamental that statutes will be construed to avoid constitutional questions and serious constitutional issues would be presented if Congress ever atttempted to suspend the availability of the writ in the constitutional courts. As the Supreme Court

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convicted by local territorial court). In all three situations, of course, exhaustion of state, military or local court remedies is a precondition to federal habeas corpus.

[14] This was consistent with the Government's argument that "Congress merely sought to establish a local court system, comparable to those in the several states, for adjudication of all non-federal matters arising in the District of Columbia." Brief for the United States, *Palmore* v. *United States*, No. 72-11, Oct. T. 1972, at p. 48. Nothing, of course, could be more "federal" that an issue arising under the federal Constitution.

has made clear, one of the inherent attributes of constitutional courts is the power to issue writs of habeas corpus. *McNally* v. *Hill*, 293 U.S. 131, 135 (1934);[15] *United States ex rel. Turner* v. *Williams*, 194 U.S. 279, 295 (1904) (Brewer, J., concurring); *Rowe* v. *Peyton*, 383 F.2d 709, 715 (4th Cir. 1967), *aff'd.*, 391 U.S. 54 (1968). As Professor Freund has argued, "[H]aving established Federal courts Congress would be powerless to deny the privilege of the writ. Otherwise Article I, section 9 would be reduced to a dead letter." Brief for Respondent, *United States* v. *Hayman*, No. 23, Oct. T. 1951, at p. 29. The Supreme Court has quoted Professor Freund's brief on this very point with approval in *Fay* v. *Noia*, 372 U.S. 391, 406 n.15 (1963). Since the privilege of the writ can only be suspended in cases of "rebellion or invasion," Art. I, § 9, cl. 2, it is clear that any construction of the local post-conviction remedy statute which would bar resort to the federal constitutional courts for the adjudication of federal constitutional issues would raise substantial doubts as to the statute's validity under the Suspension Clause of the Constitution. Hornbook principles of statutory construction call for a reading that avoids constitutional doubts, and this is particularly true where the statute, as here, is far from clear on its face and comes before the Court unaccompanied by any legislative expression of an intent to suspend the writ. *Dorsey* v. *Gill*, 80 U.S.App.D.C. 9, 16, 148 F.2d 857, 864, *cert. denied*, 325 U.S. 890 (1945).[16]

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[15] *McNally* was overruled on its construction of "custody" within the meaning of the habeas corpus statutes in *Peyton* v. *Rowe*, 391 U.S. 54 (1968), but the Supreme Court said nothing do detract from the validity of the point for which we cite the case.

[16] Of course, protection against abuse of the writ does not constitute a suspension of the writ. But that protection is built into the federal statutes for 28 U.S.C. § 2244 provides that no federal court or judge need entertain an application for the writ that has once been denied by a "court of the United States or a justice of judge of the United States." This Court, a constitutional court, is a "court of the United States." *E.g.*, *Federal Trade Commission* v. *Klesner*, 274 U.S. 145, 154 (1926); *Embry* v. *Palmer*, 107 U.S. 3 (1882). See generally, *Palmore* v. *United States*, *supra*; *O'Donoghue* v. *United States*, 289 U.S. 516 (1933). The local courts, non-consti-

For these reasons, we submit that the federal habeas corpus statute, 28 U.S.C. §§ 2241 *et seq.*, confers upon this Court jurisdiction to entertain this application for a writ of habeas corpus presenting only a federal constitutional claim. And, applicant having exhausted his remedies before the local courts,[17] we turn to the merits.

II

APPLICANT IS CONFINED IN VIOLATION OF THE FOURTH AMENDMENT

In overruling applicant's claim that he was unreasonably seized by police officers in violation of the Fourth Amendment, the local courts held that a police officer need observe no violation of law nor articulate any reason before he forces a motorist to pull his automobile to the curb and produce for the officer's inspection a driver's permit and motor vehicle registration certificate. If, during the course of such a forcible selective stop, the officer observes evidence of a crime in "plain view," the local courts have held that he may seize that evidence and use it to obtain the motorist's conviction over timely Fourth Amendment objection. We contend that the selective, forcible stop shown on this record violated applicant's right to be free from unreasonable seizures because: (1) any seizure of an individual made without at least an articulable suspicion of criminal behavior is "unreasonable" under the Fourth Amendment; and (2) the seizure shown on this record cannot be sustained on "health and safety" grounds since (a) this was not a "health and safety" seizure at all and (b) even if it were, the Fourth Amendment requires that selective intrusions, even so-

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tutional courts, are not "courts of the United States" within the meaning of such statutes. *United States* v. *Mills*, 11 App. D.C. 500 (1897); cf. *Capital Traction Co.* v. *Hof*, 174 U.S. 1, 16-18, 45 (1899).

[17] *E.g.*, *Wilwording* v. *Swenson*, 404 U.S. 249 (1971); *Roberts* v. *La Vallee*, 389 U.S. 40 (1967); *Brown* v. *Allen*, 344 U.S. 443 (1953).

called "health and safety" ones, be subject to minimum articulable suspicion standards.[18]

The Fourth Amendment provides protection not only against unreasonable searches but also unreasonable "seizures." *Terry* v. *Ohio*, 392 U.S. 1 (1968); *Adams* v. *Williams*, 407 U.S. 143 (1972). A seizure is unreasonable under the Fourth Amendment unless, at a minimum, the police have "specific and articulable facts which, taken together with rational inferences from those facts, warrant that intrusion." *Terry* v. *Ohio*, *supra*, 392 U.S. at 21. It is conceded, and the local courts expressly found, that the police officers had no such articulable facts when they seized applicant. (R. at 62). On this record, the local courts could not have done otherwise, for it could not be seriously maintained that the activity in which applicant was engaged—lawfully operating a motor vehicle in accordance with all provisions of law on the public streets —constitutes an articulable basis of suspicion warranting police intrusion into the motorist's freedom. *Commonwealth* v. *Swanger*, —— Pa. ——, 300 A.2d 66 (1973).[19]

The local courts held that Fourth Amendment protections against unreasonable seizures do not apply to seizures arguably related to "health and safety." *Palmore* v. *United States*, 290 A.2d 573, 583 n.25 (1972), *cert. denied on this issue*, —— U.S. ——, 41 L.W. 4528, 4530 n.6 (1973). This conclusion is a question of law on a constitutional matter which must be determined by this Court. *Townsend* v. *Sain*, 372 U.S. 293, 318 (1963). As a matter of constitutional law, we submit that this seizure cannot be sustained on "health and safety" grounds.

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[18] Since no one can contend that police officers may stop traffic solely to get a "plain view" of "everything that might be inside the car" (R. 37), the local court properly held that the lawfulness of the seizure of the gun turns on the lawfulness of the seizure of applicant (R. 66). See *Harris* v. *United States*, 390 U.S. 234, 236 (1968).

[19] The Prothonotary of the Pennsylvania Supreme Court has advised us that the notation "rehearing denied" appearing at 300 A.2d 66 is in error, and that the Pennsylvania Supreme Court has granted an application for rehearing, heard additional argument, and now has the case under advisement.

First, we do not think there are any "health and safety" considerations involved in this case.[20] A careful reading of the local court's opinion makes it clear that that court thought the Fourth Amendment inapplicable when police officers stop automobiles "to investigate some criminal behavior []related to the possession of a valid license and valid registration." 290 A.2d at 283 n.24; R. 64 n.24. On the record, the local court could not have properly affirmed appellant's conviction unless it so held, for the police officer flatly testified that he stopped applicant's automobile to ascertain whether there were grounds for a "criminal charge" of operation of an overdue rental car (R. 26).

This case vividly illustrates the hazards of indiscriminate use of the "health and safety" label. Here, what is termed a "routine spot check" for "health and safety" purposes involved two unmarked cars and four plain clothes officers, one of whom immediately stationed himself on the passenger side of applicant's vehicle "for the protection of [his] partner" (R. 38) and remained in that position looking for "things in the glove compartment

[20] There is no "health" consideration involved in the possession of a driver's license and motor vehicle registration certificate, and there is no "safety" consideration involved with respect to registration certificates. The motor vehicle registration procedure in both the District of Columbia and Virginia is principally a revenue-raising measure (D.C. Code § 40-102; 40 Va. Code §§ 46.1-149, 167), and merely by observing the visible license plate, a policeman can readily ascertain whether the owner of the vehicle has complied with the registration requirements. Visual inspection of the certificate, as this record clearly shows (R. 25), is designed to ascertain whether the driver of an automobile is authorized by the owner to operate the vehicle "[b]ecause it's—it's a criminal charge if [he's] not" (R. 26). While registration certificates may provide an informal method of ascertaining ownership of a vehicle, that function is one normally considered a "safety" measure. Yet, it was the registration certificate, not the driver's license, that motivated the officers to seize applicant (R. 21, 34). This is clear, not only from the officers' testimony (R. 21-22, 25-26), but from the conceded fact that having produced a valid driver's license prior to discovery of the gun, applicant was not free to move on until he had satisfied the officers that he was in possession of a valid registration permit (R. 28) and therefore not committing a "criminal offense" (R. 26, 41).

that the applicant] could be charged with" (R. 40-41). In reality, the police conduct shown on this record by the officers' own testimony constituted a "seizure" to investigate pollible criminal activity related to the use of an automobile. To be sure, the officers stopped applicant, at least in part, in order to inspect his driver's license and registration certificate. But their motivation for this inspection was not to enforce a "health and safety" regulation but to see if applicant was committing a crime (R. 26, 40-41). This is absolutely clear on the local court record, not only from the officers' own testimony, but from the practice of recording on forms:

> ". . . the name, [and] the address of the person driving, the color of the vehicle, the tag number, the driver's permit number, and the color [and] number of occupants in [the car]" (R. 35).

In this regard, the "spot check" can be viewed as a descendant of the police investigatory arrest described in a study conducted by a special committee appointed by the Commissioners of the District of Columbia. *Report and Recommendations of the Commissioners' Committee on Police Arrests for Investigation* (1962). Both "spot checks" and investigatory arrests, by their failure to provide standards that spell out adequate grounds for the seizure of an individual, leave police officers free to halt citizens virtually on whim. *Commissioners' Report, supra*, at 5. In condemning the practice of investigatory arrests, the Committee pointed to the seizure, on clearly unsubstantial grounds, of 6800 persons in the District of Columbia during the two years studied. The impact on each individual seized in an investigatory arrest is severe. However, the adverse impact upon the community of a vastly greater number of investigatory "spot checks" accompanied by the completion of investigatory forms is potent. This local court record, viewed most favorably to the Government, shows that as a matter of constitutional law, the "spot check" of applicant was an investigatory seizure in violation of the Fourth Amendment.

Even if this was a "health and safety" seizure, the local court's constitutional determination could not with-

stand attack. The local court thought the Fourth Amendment inquiry at an end when it concluded that "health and safety" was at stake. 290 A.2d at 582-583; R. 63-65. The Supreme Court's Fourth Amendment jurisprudence flatly rejects that approach. *Camara* v. *Municipal Court*, 387 U.S. 523, 533-534 (1967); *See* v. *City of Seattle*, 387 U.S. 541 (1967). Indeed, *Terry's* requirement of "articulable suspicion" for police-citizen street encounters flows directly from *Camara's* holding that salutory reasons for a search or a seizure do not remove conduct from Fourth Amendment scrutiny altogether, although such reasons may justify an "intermediate response" to Fourth Amendment standards of reasonableness. *Terry* v. *Ohio*, 392 U.S. 1 (1968). "Health and safety" considerations, assuming that such exist in this case, are merely factors to be balanced with the fundamental rights protected by the Fourth Amendment in assessing the constitutional reasonableness of a particular intrusion.

Of course, there are obvious safety considerations involved in the operation of automobiles, and we do not contend that driver's license statutes are not related to a public safety purpose. Nor do we contend that the Fourth Amendment prohibits any and all efforts by police to ensure compliance with licensing regulations and statutes. We do contend, however, that the means by which the police seek to achieve this public safety purpose must be carefully balanced against the obvious potential of serious Fourth Amendment incursions.

The term "spot check", we respectfully submit, hinders, instead of aids, Fourth Amendment analysis. We challenge only the "spot check" shown on this record whereby: (1) police officers are told to make such checks (R. 19, 35); (2) the officer making the decision to seize appellant is furnished on standards on which that decision is to be based and is under the impression that "this is left up to each individual officer" (R. 19); (3) this same officer selects rented automobiles because of the possibility of a "criminal charge" for driving an overdue car (R. 25-26); and (4) the officers are instructed to complete informal forms prepared by the Special Operations Division which are handed in to the division following "spot checks" (R. 35-36). That conduct, we submit, is violative of the Fourth Amendment's requirement of reasonableness. *Commonwealth* v. *Swanger*, —— Pa. ——, 300 A.2d 66 (1973); *cf. Gomez* v. *Wilson*, 323 F. Supp. 87 (D.D.C. 1971), *remanded*, —— U.S.App.D.C. ——, —— F.2d —— (1973). The holding which we seek will not, of course, outlaw all police efforts to engage in *bona fide* non-selective "spot checks" of automobiles;[21] nor would it necessarily outlaw selective "spot checks" conducted in accordance with announced standards which pass muster under the Fourth Amendment's reasonableness standard. Cf. *Gomez* v. *Wilson*, *supra*; *United States* v. *Lopez*, 328 F. Supp. 1077 (E.D. N.Y. 1971). Finally, the Fourth Amendment holding which we seek does not preclude consideration of the mobility of an automobile as *a* factor in judging the constitutional validity of "articulable suspicion" for a particular vehicle stop,[22] for on this record it is conceded that the officers had no factual information whatever save the fact that applicant was lawfully operating an automobile on the public street.

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[21] Compare *Camara* v. *Municipal Court*, 387 U.S. 523 (1967); *See* v. *City of Seattle*, 387 U.S. 541 (1967); Comment, *Interference with the Right to Free Movement: Stopping and Search of Automobiles*, 51 Cal.L.Rev. 907 (1963); Note, *Use of Police Roadblocks to Inspect Licenses*, 37 Conn.B.J. 486 (1963); Note, *The Driver's License Display Statute: Problems Arising from its Application*, 1960 Wash.U.L.Q. 279. See *City of Miami* v. *Aronovitz*, 114 So.2d 784, 787 (Fla. 1959); *Commonwealth* v. *Mitchell*, 355 S.W.2d 686, 687 (Ky., 1962); *Edwards* v. *State*, 319 P.2d 1021, 1026 (Okla. 1957).

[22] *United States* v. *Fallon*, 457 F.2d 15 (10th Cir. 1972); *Young* v. *United States*, 140 U.S.App.D.C. 333, 336-337, 435 F.2d 405, 408-409; *United States* v. *Madril*, 445 F.2d 827 (9th Cir. 1971), *vacated on other grounds*, 404 U.S. 1010; *United States* v. *Thompson*, 420 F.2d 536 (3d Cir. 1970); cf. *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971); *Preston* v. *United States*, 376 U.S. 364 (1964).

Conclusion

For the foregoing reasons, the Court should issue the writ of habeas corpus.

Respectfully submitted,

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[The Supreme Court Appendix to the briefs in *Palmore* v. *United States*, No. 72-11 which was appended to this application has been omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Habeas Corpus No. HC 31-73

[Filed May 16, 1973, James F. Davey, Clerk]

ROOSEVELT PALMORE, PETITIONER

vs.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA, THE ATTORNEY GENERAL OF THE UNITED STATES, DIRECTOR, DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS, RESPONDENTS

ORDER DIRECTING RESPONDENT
TO SHOW CAUSE

It is this 16th day of May, 1973, ORDERED that the respondent either in person or by counsel appear in the Court on or before the tenth day after service of a copy of this order and of the petition upon him and make return to said petition and show cause, if any he has why the Writ of Habeas Corpus should not issue.

IT IS FURTHER ORDERED that the respondent serve on the petitioner by mail a copy of his answer to this rule.

/s/ Matthew F. McGuire
Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Habeas Corpus No. 31-73

[Filed Jun. 4, 1973, James F. Davey, Clerk]

ROOSEVELT PALMORE, PETITIONER

v.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA, THE ATTORNEY GENERAL OF THE UNITED STATES, DIRECTOR, D.C. DEPARTMENT OF CORRECTIONS, RESPONDENTS

RETURN AND ANSWER TO ORDER TO SHOW CAUSE

Come now the respondents by their attorney, the United States Attorney for the District of Columbia, and assert as follows:

The extended procedural background of this case is set forth in full in petitioner's pleadings. Briefly, petitioner was convicted of carrying a dangerous weapon (felony) in violation of 22 D.C. Code 3204 in the Superior Court. He appealed and the conviction was affirmed by the D.C. Court of Appeals. *United States* v. *Palmore*, 290 A.2d 573 (1972). An appeal was taken to the Supreme Court. The appeal was dismissed, certiorari granted in part and the decision of the D.C. Court of Appeals, upholding the jurisdiction of the Superior Court to try felonies under the D.C. Code was affirmed. The instant petition followed. For the reasons set forth in the attached memorandum, respondents pray that the Order to Show Cause be discharged and the petition for a writ of habeas corpus be dismissed.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Habeas Corpus No. 31-73

[Filed Jun. 4, 1973, James F. Davey, Clerk]

ROOSEVELT PALMORE, PETITIONER

v.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA, THE ATTORNEY GENERAL OF THE UNITED STATES, DIRECTOR, D.C. DEPARTMENT OF CORRECTIONS, RESPONDENTS

MEMORANDUM OF LAW

There are but two questions pertinent to the instant inquiry. (1) Has Congress limited the power of the United States District Court for the District of Columbia to hear collateral attacks on Superior Court criminal convictions?; and (2) If so, did they have the power to do it? If the answer to both of these questions is "yes", as we shall contend, then the other arguments raised by petitioner have no bearing on this inquiry. It becomes immaterial, for instance, that "the District of Columbia (would be) the only place in the nation where a criminal defendant can never obtain a ruling on a federal constitutional issue from a federal constitutional court." (Pets.' Br. p. 11). If Congress sought to so distinguish the District of Columbia and had the power to do so, the fact that they may somehow have spoiled the symmetry of the traditional federal state system is not a matter which may be inquired into. We thus turn to the two questions:

I. Under 23 D.C. Code § 110 Congress has vested exclusive post-conviction collateral review of Superior Court convictions in the sentencing court.

One of the major reasons behind the Court Reorganization Act was the recognition that the United States District Court for the District of Columbia was so over-

burdened with essentially local matters that it was unable to effectively carry out the normal functions of a federal district court. The Senate Committee on the District of Columbia summarized the problem in the following terms: (S. Rep. No. 91-405, 91st Cong., 1st Sess. p. 3).

> The burden is acute in the District of Columbia, the seat of the Federal Government, where, in the absence of inordinately crowded dockets (both civil and criminal), a substantial and greater quantum of genuinely Federal litigation might best and conveniently be brought. Yet, at present the median time for civil jury trial in the U.S. District Court for the District of Columbia is nearly double the median for Federal district courts nation-wide. In recent years as many as 12 out of 14 judges of the Federal court in the National Capitol have been assigned full time to the trial of local felony offenses.

It was to remedy this situation that the Court Reorganization Act was passed. The Act consolidated the local trial courts into a new court of general local jurisdiction, the Superior Court of the District of Columbia. See Section 111 of the Act, 84 Stat. 482; D.C. Code § 11-901. The Superior Court was given jurisdiction "of any criminal case under any law applicable exclusively to the District of Columbia" (Section 111 of the Act, 84 Stat. 486; D.C. Code § 11-923(b) and, with the exception of matters over which exclusive jurisdiction is vested in a federal court, "of any civil action or other matter (at law or in equity) brought in the District of Columbia" (Section 111 of the Act, 84 Stat. 484; D.C. Code § 11-921 (a)).[1]

At the same time, the Act eliminated the federal district court's special jurisdiction over local civil matters and reduced its jurisdiction over local criminal offenses to prosecutions involving a federal (United States Code) offense. See Section 111 of the Act, 84 Stat. 476, 477; *D.C. Code* §§ *11-501*, *11-502*. The former appellate jurisdiction of the United States Court of Appeals for the

[1] The jurisdictional changes brought about by the Act were made effective in stages over the course of a transitional period.

District of Columbia Circuit over the judgments of the District of Columbia Court of Appeals, with only a minor exception, was also eliminated (Section 111 of the Act, 84 Stat. 476; *D.C. Code* § *11-301*) and the District of Columbia Court of Appeals was declared to be the "highest court of the District of Columbia," whose judgments are reviewable directly by the Supreme Court (Section 111 of the Act, 84 Stat. 475; *D.C. Code* § *11-102*).

Petitioner now proposes to upset this system by returning to the District Court the power, and hence the duty to collaterally review, pursuant to 28 U.S.C. 2241, all Superior Court criminal convictions. Furthermore, if petitioner's logic is accepted, habeas corpus would also lie in this Court to challenge pre-trial rulings of the Superior Court.[2] This Court would thus once more be overwhelmed with the task of ruling on essentially local matters such as right to be released on bail before trial, admissibility of evidence at trial (as here), etc. Even if collateral review is somehow limited to post-conviction situations it would represent a heavy burden on this Court in derogation of the Court Reform Act. See, *Palmore* v. *United States*, —— U.S. —— 41 L.W. 4528, 4534 (dec. 4-24-73).[3]

The intention of Congress to place both trial and review of local criminal matters exclusively in the Superior

[2] Petitioner contends that § 2241, not 28 U.S.C. 2254, is the appropriate remedy here because he is in federal rather than state custody. If this is so, then the "exhaustion of state remedies" provisions of § 2254 are not applicable as a check on the District Court's power and the writ must be potentially available to *anyone* in "custody" in the District of Columbia whether in a pre-trial, during trial, pending appeal or final conviction status. Thus petitioner seeks to give this Court far *greater* power than any other district court by urging that it can interfere with local proceedings at any time, without the necessity of exhausting local remedies.

[3] *Palmore* noted that the purpose of the Court Reform Act was to

> relieve the regular Art. III courts . . . from the smothering responsibility for the great mass of litigation, civil and criminal, that inevitably characterizes the Court system in a major city and to confine the work of those courts to that which, for the most part, they were designed to do, namely the trial of cases arising under the Constitution and the nationally applicable laws of Congress. Ibid.

Court is clearly expressed in *23 D.C. Code § 110* which creates a remedy exactly equal, by its terms, to that established by 28 U.S.C. 2255 in the federal system. § 110 (g) states that:

> An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section *shall not be entertained by the Superior Court or by any Federal or State Court* if it appears that the applicant has failed to make a motion for relief under this section or that the Superior Court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention. (Emphasis added).

Petitioner contends that the above section is confusing (Pet's. Br. p. 10). Whatever confusion this section may hold for petitioner, its prohibition against habeas corpus being entertained by "any Federal . . . Court" is explicit. It is also directly on point. Petitioner here seeks to challenge his Superior Court conviction in a Federal District Court without having presented the motion to the Superior Court, his exclusive source of relief by the terms of this section. This he cannot do.

Any confusion about the necessity of applying to the sentencing court for relief may be resolved by reference to the case law interpreting 28 U.S.C. 2255 from which § 110 was derived. It is well settled that if relief is possible under § 2255 such relief must be sought in the sentencing court and habeas corpus relief is not available. 2 C.A. Wright, *Federal Practice and Procedure*, §§ 591, 593; E.g., *Walker* v. *United States*, 429 F.2d 1301 (5th Cir. 1970); *Bandy* v. *Willingham*, 398 F.2d 333 (8th Cir. 1968) *cert. den.* 393 U.S. 1006; See, discussion in *United States* v. *Hayman*, 342 U.S. 205, 210-222 (1952).

The only exception to the rule that a collateral attack upon a conviction or sentence may be brought only in the sentencing court is when relief in that court is "inadequate or ineffective." 28 U.S.C. 2255, *23 D.C. Code* 110(g). Petitioner makes no such explicit claim here, nor

can he. Since *Kaufman* v. *United States*, 394 U.S. 217 (1969) claims alleging illegal searches and seizures may be raised on a § 2255 (and hence a § 110) motion. Furthermore, it is well settled that lack of success on such a motion (and hence, anticipated lack of success as here) does not render the remedy by § 2255 motion "inadequate or ineffective." The only time the motion would be inadequate is when the sentencing court lacks power to grant the relief sought, which is certainly not the case here. *Smith* v. *Reid*, 89 U.S. App. D.C. 272, 191 F.2d 491 (1952); *Boyden* v. *United States*, 463 F.2d 229 (9th Cir. 1972); *Walker* v. *United States*, 429 F.2d 1301 (5th Cir. 1970); *Littero* v. *Parker*, 369 F.2d 395 (3d Cir. 1966).

The statute allows no further exceptions. It is thus true, as petitioner postulates (Pet's. Br. pp. 10-11) that § 110 precludes an Article III court from considering a writ of habeas corpus claiming denial of a federal constitutional right. This, according to the clear wording of the statute, was the intent of Congress. See, Rauh and Silbert, *Criminal Law and Procedure: D.C. Court Reform and Criminal Procedure Act of 1970*, 20 Am. U.L. Rev. 252, 339-40.[4]

Any doubt that Congress intended to limit the power of this Court more than that of the other Federal District Courts is resolved by reference to *16 D.C. Code 1901*. That section provides that the District Court has power to issue writs of habeas corpus only to federal officers and employees in the District of Columbia, petitions for writs against "any other person shall be filed in the Superior Court . . ." 16 *D.C. Code* 1901.[5] There is no exception for raising "constitutional claims" in the

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[4] "[T]he Court Reorganization Act extinguishes the traditional authority of the federal courts to review local judicial action by the issuance of writs of habeas corpus." Williams, *D.C. Court Reorganization* 59 Geo. L.J. 477, 499; *Bland* v. *Rogers*, 332 F. Supp. 989, 991 (n. 12) (D.D.C. 1971); *Palmore* v. *United States*, 290 A.2d 573, 580 (D.C. App. 1972).

[5] Prior to the 1970 amendment, this section gave the District Court exclusive power to grant the writ against any "officer or other person in whose custody or keeping the party so detained is . . . ."

District Court. If a person is in a local jail in Alabama and feels he has been denied a speedy trial he may, after exhausting state remedies, petition the Federal District Court in that state for habeas corpus against the local officials. By contrast, if he is in the custody of a local official[6] in the District of Columbia he may *not*, by the terms of § 1901, apply to the District Court for relief. The power of the District Court has been curtailed by Congress, the reason being, as discussed above, that the potential petitioner, unlike the man in Alabama or any other state, can have his rights vindicated in another federal court of competent jurisdiction.

II. Congress had the power to create such an exclusive remedy in the Superior Court.

Given the clear intent of Congress to eliminate habeas corpus review in the District Court we must turn to the question of whether Congress had the power to carry out such an intention. This in turn depends upon a determination of whether limiting, except in unusual circumstances, collateral review of a criminal conviction to the sentencing court which was created under Article I, is unconstitutional.

It is true, as petitioner points out (Pet's. Br. p. 11) that such a limitation would make the District of Columbia the only place where a criminal defendant can never obtain a ruling on a federal constitutional issue from an Article III court. Yet, as we shall discuss, *infra*, there is no authority for the proposition that Article III includes an inherent demand that a court created under that provision must hear federal constitutional claims. As the Supreme Court pointed out in *Palmore*, supra, "neither this Court nor Congress has read the Constitution as requiring every federal question arising under the federal law . . . to be tried in an Art. III court. . . ." 41 L.W. at 4533.

The Superior Court, as decided in *Palmore*, *supra*, is competent to try cases arising under federal law. It

[6] Leaving aside the difficult question of which District of Columbia officials are local and which federal under this statute.

is similarly competent to decide federal constitutional questions under 23 D.C. Code 110 as it is mandated to do by Congress. The Superior Court is not a state court, independent of Congressional control. It is a *federal* court, designed to vindicate federal rights at the local level. It was created for this purpose by Congress and its function is to enforce the laws of Congress. Its judges, like United States District judges, are nominated by the President and confirmed by the Senate. The prosecutors in both courts are from the United States Attorney's Office. The only difference is that Superior Court judges serve a fifteen year term while District judges are appointed for life.[7]

This is not to deny that the scope of the Superior Court's competence differs from that of the District Court. It is true, as the Supreme Court pointed out in this case, that the citizens of the District "must or may resort" to Art. III judges "for consideration of those constitutional statutory matters of general concern. . . ." Ibid, at 41 L.W. 4533.

However, this power of Art. III judges is *not* an inherent constitutional power. It is a power granted by Congress. As such, it can be taken away by Con-

[7] It is clear that while Congress looked for guidance to the state-federal model in defining the respective jurisdictions of the Superior and District Courts it did not find the analogy complete and did not intend it to be so regarded (E.g., in addition to the federal aspects of the Superior Court previously mentioned, United States Marshals serve the Superior Court, prisoners convicted in the Superior Court are remanded to the custody of the Attorney General, Superior Court felony arrest warrants can be served throughout the entire United States, the Federal Rules of Criminal and Civil Procedure unless modified or otherwise provided in 23 D.C. Code are applicable in the Superior Court, 11 *D.C. Code* 946; and St. Elizabeths Hospital, a federal institution, is available for examination and commitment of persons mentally incompetent for trial or found not guilty by reason of insanity in the Superior Court.

In short, it is apparent that Congress had in mind "the practical objective of streamlined, efficient administration of justice in the District rather than providing the citizens of the District with the benefits of the dual court system familiar to the states." Williams, *District of Columbia Court Reorganization*, 1970, 59 Geo. L.J. 477, 511 (1971).

gress. As argued in Part I, *supra*, 23 *D.C. Code* 110(g) takes away the power of Art. III judges to entertain a collateral attack on a Superior Court conviction.

Indeed Congress has frequently curtailed, or failed to grant, various powers to the Art. III courts. As Chief Justice Marshall stated unequivocally in *Ex Parte Bollman*, 8 U.S. (4 Cranch) 75, 94 (1807) ". . . [T]he power to award the writ by any of the courts of the United States must be given in written law." [8] (Emphasis added.) Indeed, prior to an Act of Congress in 1867 (See 14 Stat. 385) the federal courts had no power to issue the writ to anyone in state custody. 1 Stat. 81; See discussion in *Kaufman* v. *United States*, 374 U.S. 217, 221 (1969).

In *Glidden Company* v. *Zdanok*, 370 U.S. 530, 551 (1962) the Supreme Court observed that

> The great constitutional compromise that resulted in agreement upon Art. III, § 1, authorized but did not obligate Congress to create inferior federal courts. . . . Once created, they passed almost a century without exercising any very significant jurisdiction. . . . Throughout this period and beyond it up to today, they remained constantly subject to jurisdictional curtailment.

The power of Congress to limit and control the jurisdiction of the federal courts has been exercised on other occasions. For example, and particularly pertinent in the present context, when Congress created the Circuit Courts of Appeals in 1891, the act establishing the courts did not authorize them to issue writs of habeas corpus, and the Supreme Court accordingly held that in the absence of a congressional grant of jurisdiction, they had no authority "to issue original and independent writs

[8] For other cases in which the Supreme Court stated that the jurisdiction of federal courts (except the Supreme Court) to issue writs of habeas corpus is surely statutory, See, *Ex parte Dorr*, 3 How. 104, 105 (1845); *Ex parte Parks*, 93 U.S. 18, 22 (1876); Ex parte Hung Hang, 108 U.S. 552 (1883); *In re Burris*, 136 U.S. 586, 591 (1890).

of *habeas corpus*." *Whitney* v. *Dick*, 202 U.S. 132, 137 (1906). Moreover, it is clear that Congress may not only limit the jurisdiction it vests in inferior Article III courts, but it also may withdraw jurisdiction from such courts and even abolish the courts themselves.[9] In 1911, for example Congress abolished the Circuit Courts which it had created in 1789 and thereby withdrew all of their jurisdiction. Accordingly, the Supreme Court held that the remaining circuit judges, whose offices were created in 1869 but whose courts had been abolished, had no authority to issue writs of habeas corpus under the habeas statute. *Craig* v. *Hecht*, 263 U.S. 255, 273 (1923).

This power of Congress to limit the jurisdiction of a United States District Court was exercised again in 1970 by the enactment of 16 *D.C. Code* § 1901(c) (Supp. V., 1972) in the Court Reform Act. That provision is also the result of an exercise by Congress of its power under the District Clause, Article I, Section 6, Clause 17 of the Constitution, to "exercise exclusive Legislation *in all cases whatsoever*, over such District (not exceeding ten Miles square) as may . . . become the Seat of the Government of the United States" (emphasis added), a power independent of any limitation imposed by Article III of the Constitution. *Glidden Company* v. *Zdanok*, *supra*; *O'Donoghue* v. *United States*, 289 U.S. 516, 545-546 (1933); Kendall v. United States, 12 Pet. 525, 619 (1838).

Prior to February 1, 1971, the effective date of the Court Reform Act, a person in the District of Columbia could seek a writ of habeas corpus under 16 *D.C. Code* § 1901 (1967) and under 28 U.S.C. § 2241. Pursuant to both of these provisions, such a person alleging unlawful restraint was given a habeas remedy in the United States District Court for the District of Columbia. There was no general habeas remedy in the

[9] Cf. Act of March 27, 1868, c.34, § 2, 15 Stat. 44, by which Congress withdrew from the Supreme Court jurisdiction of appeals from habeas decisions by the lower federal courts. This Act was upheld in *Ex parte McCardle*, 7 Wall. 506 (1868).

Court of General Sessions.[10] When Congress amended Section 1901 in 1970, it granted to the successor of the Court of General Sessions a general habeas authority *and* restricted the habeas remedy in the United States District Court for the District of Columbia to allegations of restraint by Federal officials. This action was consistent with the fundamental purpose of the Court Reform Act to create within the District of Columbia two completely self-sufficient and independent court systems, one to handle only "national-federal" litigation, the other to handle all "local-federal" litigation. As pointed out, *supra*, this represents yet another example of both the power and the intention of Congress to limit the District Court's jurisdiction.

The Constitution provides in Art. I § 9 Cl. 2 that "The Privilege of the Writ of Habeas Corpus shall not be suspended. . . ." Congress' placing of collateral review power in the Superior Court does not "suspend" the writ. There is no requirement in the Constitution that the writ, if made available, be made available in a particular kind of federal court. Furthermore, the United States Court of Appeals has explicitly recognized the power of Article I judges to vindicate federal constitutional claims in *Lurk* v. *United States*, 111 U.S. App. D.C. 238, 296 F.2d 360 (1961) aff'd on other grounds sub nom *Glidden Co.* v. *Zdanok*, 370 U.S. 350 (1962) wherein the Court of Appeals held, *en banc*, that an Article I judge could sit on the District Court and perform all of the functions of a District Court judge (including, implicitly, exercising habeas corpus jurisdiction).

Thus, it is apparent that Congress, in an exercise of its inherent power to grant or deny powers to Article III courts has limited the power of the District Court in such a way as to render this Court without jurisdiction to grant the writ in the instant case.

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[10] The only habeas authority granted by Congress to the former Court of General Sessions was limited to its Domestic Relations Branch. See 11 D.C. Code § 1161 (1967).

III. Search and Seizure claims should not be cognizable on collateral attack.

Alternatively, we would urge, as did Justices Powell, Burger and Rehnquist, concurring in the recent case of *Schneckloth* v. *Bustamonte*, —— U.S. ——, 41 L.W. 4726, 4735 (1973) that petitioner's search and seizure claim should not be entertained on a habeas corpus (or § 110) motion.

They state that scholarly research since *Fay* v. *Noia*, 372 426 (1963) on which Kaufman is based, indicates that *Fay's* expansive notion of the scope of habeas corpus review was based on an erroneous view of the history of that writ. 41 L.W. at 4737 They conclude that "[w]here there is no constitutional claim bearing on innocence, the inquiry of the federal court on habeas review of a state prisoner's Fourth Amendment claim should be confined solely to the question of whether the defendant was provided a fair opportunity in the state courts to raise and have adjudicated the Fourth Amendment claim." 41 L.W. at 4740. If state habeas corpus were so limited, the equal protection rationale for *Kaufman* infra, would be eroded and federal habeas corpus or § 2255 claims would also be narrowed in scope.

We recognize that this position is in conflict with *Kaufman* v. *United States*, 394 U.S. 217 (1969). However, Justice Blackmun agreed, in *Schneckloth* that *Kaufman* is incorrect but felt the issue wasn't presented in that case. 41 L.W. at 4735. Furthermore, Justice Stewart dissented in *Kaufman*. Thus, there are at least five justices who believe that *Kaufman* is incorrect. Under these circumstances there is authority for disregarding the lame duck Supreme Court precedent.

Thus, in *Perkins* v. *Endicott Johnson Corp.*, 128 F.2d 208, 217-18 (2nd Cir. 1942) the court held that

> Legal doctrines, as first enunciated, often prove to be inadequate under the impact of ensuing experience in their practical application. And when a lower court perceives a pronounced new doctrinal

trend in Supreme Court decisions, it is its duty, cautiously, to be sure, to follow—not to resist it.

Similarly, in *Barnette* v. *W.Va. State Board of Education*, 47 F.Supp. 251 (1942) aff'd 319 U.S. 624 (1942) Judge Parker of the Fourth Circuit, sitting on a three-judge court, declined to follow the clear Supreme Court precedent of *Minersville Sch. Dist.* v. *Gobitis*, 310 U.S. 586 (1940) on the grounds that the Supreme Court appeared ready to overrule *Gobitis* (which they did on appeal in *Barnette* itself.) See, also *United States ex rel. Meadows* v. *State of N.Y.*, 426 F.2d 1176, 1181-82 (2nd Cir. 1970) in which the Second Circuit declined to adhere to the "apparently uncompromising dictates" of *Aherns* v. *Clark*, 335 U.S. 188 (1948) in allowing a habeas corpus petitioner to bring his action in a district other than the one in which he was confined. This case was cited with approval in *Braden* v. *30th Judicial Circuit Court of Ky.*, ——, U.S. ——, 93 S.C. 1123 (1973) which overruled *Ahrens*.

Accordingly, we would request this Court to rule that petitioner's search and seizure claim is no longer cognizable in a habeas corpus petition.

IV. The Stop and Search of Petitioner was legal.

Even if this Court believes that it has jurisdiction in the instant case, petitioner's substantive claims lack merit. Here we rely on the opinion of the District of Columbia Court of Appeals (included in petitioner's appendix) and on the Government's brief in this case in the Supreme Court (attached).

Conclusion

For the reasons stated it is respectfully submitted that the order to show cause be discharged and the petition for a writ of habeas corpus be dismissed.

/s/ Harold H. Titus, Jr.
HAROLD H. TITUS, JR.
United States Attorney

/s/ Earl J. Silbert
EARL J. SILBERT
Principal Assistant U.S. Attorney

/s/ Oscar Altshuler
OSCAR ALTSHULER
Assistant United States Attorney

/s/ Craig M. Bradley
CRAIG M. BRADLEY
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing return and answer to show cause has been mailed to attorney for petitioner, Frank Flegal, Esq., Georgetown University Law Center, 600 New Jersey Avenue, N.W., Washington, D.C. 20001, this 4 day of June, 1973.

/s/ Craig M. Bradley
CRAIG M. BRADLEY
Assistant United States Attorney

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[Pages 49-56 of the Government's brief filed with this Court in *Palmore* v. *United States*, No. 72-11 headed "The Selective Stop of An Automobile Driver for the Purpose of Inspecting his Driving Permit and Vehicle Registration Certificate Does Not Constitute An Unreasonable Seizure", which was appended to this Return and Answer, has been omitted here]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Habeas Corpus No. 31-73

[Filed Jun. 21, 1973, James F. Davey, Clerk]

ROOSEVELT F. PALMORE, PETITIONER

v.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA, ET AL., RESPONDENTS

PETITIONER'S SUPPLEMENTAL MEMORANDUM

Preliminary Statement

On June 18, 1973, the Court heard oral argument on the application for writ of habeas corpus and took the matter under advisement. One of the issues vigorously contested both in the memoranda of the parties and the arguments of counsel is the jurisdiction of this Court to entertain the application. On June 21, 1973, petitioner's counsel received the current issue of the advance Supreme Court Reports, 93 S. Ct., No. 16, which contains the proposed Federal Rules Governing Habeas Corpus Proceedings. Because these rules have direct bearing on the jurisdictional issue, this supplemental memorandum is tendered solely for the purpose of calling this important additional authority to the Court's attention.

ARGUMENT

Pursuant to appointment by the Chief Justice of the United States, the Advisory Committee on Criminal Rules has studied the administration of habeas corpus applications in the United States District Court and has submitted for consideration and comment its proposed rules. Two of those rules have a vital bearing on the jurisdictional issue now pending *sub judice* before the Court.

In pertinent part, Rule 1 of the Proposed Rules Governing Habeas Corpus Proceedings for the United States District Courts provides:

> "These rules govern the procedure in the United States district courts on applications (a) by persons in custody pursuant to the judgment of a state court for a determination that such custody is in violation of the Constitution, laws, or treaties of the United States . . . ." 93 S. Ct., No. 16, at 34.

The advisory committee's notes makes it plain that proposed Rule 1 is designed, inter alia, to summarize the scope of federal habeas corpus jurisdiction pursuant to 28 U.S.C. §§ 2241, *et seq.* The committee noted:

> "The basic scope of habeas corpus is prescribed by statute. 28 U.S.C. § 2241(c) provides that the 'writ of habeas corpus shall not extend to a prisoner unless * * * [h]e is *in custody* in violation of the Constitution." 28 U.S.C. § 2254 deals specifically with state custody providing that habeas corpus shall apply only 'in behalf of a person in custody pursuant to a judgment of a state court * * *." *Ibid.* (emphasis in the original).[1]

Implementing this general definition of the scope of federal habeas corpus—and dealing directly with the issue which respondents raise here—the advisory committee provided in Rule 13 of its proposed rules:

> "For purposes of these rules the phrase *'state court' includes the Superior Court of the District of Columbia.*" 93 S.Ct., No. 16, at 89 (emphasis added).

It is therefore clear that, contrary to respondents' argument, the advisory committee has taken the view that this Court indeed possesses habeas corpus jurisdiction on application of one in custody pursuant to a judgment of the Superior Court of the District of Columbia who claims that such custody is in violation of the Constitution of

[1] The advisory committee's comprehensive notes on the "custody" requirement point out that petitioner's status on bail pending appeal constitutes "custody" within the meaning of the federal habeas corpus statutes. 93 S. Ct., No. 16, at 35-37. Since the committee prepared its notes, the Supreme Court has agreed. See *Hensley* v. *Municipal Court*, —— U.S. ——, 93 S. Ct. 1571 (1973).

the United States.[2] While, of course, this Court is not bound by proposed rules, we respectfully submit that this construction of the federal habeas corpus statutes, and the relationship between the constitutional and legislative courts in the District of Columbia, should be given great weight in passing upon the jurisdictional issue raised by this habeas corpus application.[3]

Finally, the advisory committee expressly addressed a point which the Court raised during oral argument with regard to the reviewing function of the federal habeas corpus court. In its proposed Rule 8, the committee set forth standards for evidentiary hearings, and in the notes which accompany that proposed rule, the committee pointed out:

> "If dismissal has not been ordered, the court must determine whether an evidentiary hearing is required. This determination is to be made upon a review of the answer, the transcript and record of state court proceedings, and if there is one, the expanded record." 93 S. Ct., No. 16, at 70, citing *Townsend* v. *Sain*, 372 U.S. 293 (1963).

While the local court record, whice is annexed as an appendix to our memorandum of points and authorities, is adequate for resolution of the Fourth Amendment issue tendered, *Townsend* v. *Sain*, *supra*, cited by the advisory committee, speaks directly to the point which the Court posed during oral argument. In that case, Chief Justice Warren, speaking for the Court, said:

[2] The application for writ of habeas corpus filed herein invoked this Court's jurisdiction pursuant to 28 U.S.C. §§ 2241 *et seq.* Since the judicially imposed exhaustion requirement for § 2241 applications is co-extensive with the statutory exhaustion requirement set forth in § 2254, *e.g.*, *Stack* v. *Boyle*, 342 U.S. 1, 6-7 (1951); *United States* v. *Hayman*, 342 U.S. 205, 223 n.40 (1952); *Ex parte Royall*, 117 U.S. 241 (1886), it is clear that this Court's jurisdiction is proper. Under either § 2241 or § 2254, petitioner has exhausted his local remedies and the matter is ripe for federal habeas corpus consideration. *E.g.*, *Brown* v. *Allen*, 344 U.S. 443 (1953); *Roberts* v. *La Vallee*, 389 U.S. 40 (1967).

[3] Among other prominent members of the advisory committee are Circuit Judge Robb and District Judge Gesell. 93 S.Ct., No. 16, at III.

> "Although the district judge may, where the state court has reliably found the relevant facts, defer to the state court's findings of fact, he may not defer to its findings of law. It is the district judge's duty to apply the applicable federal law to the state court fact findings independently. The state conclusions of law may not be given binding weight on habeas. That was settled in Brown v. Allen, supra, 344 U.S. at 506 (opinion of Mr. Justice Frankfurter)." 372 U.S. at 318.

For the reasons set forth in our memorandum of points and authorities, we respectfully submit that an independent application of federal constitutional law to the facts shown in the local court record compels the conclusion that petitioner is in custody in violation of the Fourth Amendment to the Constitution.

Conclusion

The application for a writ of habeas corpus should be granted.

Respectfully submitted,

/s/ Frank F. Flegal
FRANK F. FLEGAL
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
(624-8208)
Attorney for Petitioner.

June 21, 1973

Certificate of Service

A copy of the foregoing supplemental memorandum has been delivered to Craig Bradley, Esq., Assistant United States Attorney, United States Courthouse, Washington, D. C. 20001, attorney for respondents, this 21st day of June, 1973.

FRANK F. FLEGAL
/s/ Frank F. Flegal

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-1832

[Filed Jan. 28, 1975, United States Court of Appeals for the District of Columbia Circuit, Hugh E. Kline, Clerk]

ROOSEVELT F. PALMORE, APPELLANT

v.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA, *et al.*, APPELLEES

APPELLANT'S MOTION FOR LEAVE TO AMEND JURISDICTIONAL ALLEGATIONS

Pursuant to 28 U.S.C. § 1653, appellant respectfully moves for leave to amend the jurisdictional allegations set forth in his application for writ of habeas corpus by adding to paragraph three thereof the following underscored allegations so that, as amended, the paragraph would read:

> 3. This Court has jurisdiction to entertain this application and issue the writ of habeas corpus as prayed herein pursuant to 28 U.S.C. §§ 2241 *et seq.* Jurisdiction is also invoked under and by virtue of Article I, § 9, cl. 2 and Article III of the Constitution of the United States and 28 U.S.C. § 1651. *Alternatively, this action arises under the Fourth Amendment to the Constitution of the United States, involves an amount in controversy which exceeds the sum of ten thousand dollars ($10,000), and this Court has jurisdiction pursuant to 28 U.S.C. § 1331. There exists between the parties an actual controversy, and this Court has power to declare the respective rights of the parties, and to award such other relief as may be necessary and proper, pursuant to 28 U.S.C. §§ 2201-2202.*

This appeal presents for decision the question of the jurisdiction of the United States District Court to entertain complaints by prisoners who have unsuccessfully contended in the local District of Columbia courts that they are in custody in violation of the Constitution of the United States. In the District Court, appellant bottomed his jurisdicional allegations on the statutory and constitutional power of the Article III courts to award writs of habeas corpus. In this Court, appellees contend that 23 D.C. Code § 110(g) deprives the constitutional courts of jurisdiction to award the writ, although they have conceded that § 110(g) does not deprive those courts of jurisdiction to award other remedies found necessary and appropriate to redress a constitutional violation. Brief for Appellees at 14-15, n. 13. This concession is deemed to be without significance by appellees "since appellant has only petitioned the District Court for a writ of habeas corpus" and thus "the jurisdictional bar of subsection (g) would be sufficient grounds for dismissal of his *cause of action*." *Ibid.* (emphasis added). This latter contention reflects a fundamental misunderstanding of the role of pleading in federal adjudication, for a litigant does not lose his "cause of action" simply because he has not demanded one type of relief instead of another, Rule 54(c), F.R.C.P.,[1] nor does he suffer a "dismissal of his cause of action" merely because his jurisdictional allegations are arguably defective. 28 U.S.C. § 1653. *E.g.*, *Tatum* v. *Laird*, 144 U.S. App. D.C. 72, 76 n.8, 444 F.2d 947, 951 n.8, *rev'd on other grounds*, 408 U.S. 1 (1972); *Jones* v. *Freeman*, 400 F.2d 383, 387 (8 Cir. 1968); *Mantin* v. *Broadcast Music, Inc.*, 248 F.2d 530, 531 (9 Cir. 1957); *Blanchard* v. *Terry & Wright, Inc.*, 218 F. Supp. 910, 913-914 (W.D. Ky., 1963), *aff'd*, 331 F.2d 467 (6 Cir. 1964). Compare *Childs* v. *United States Board of Parole*, —— U.S. App. D.C. ——, —— F.2d —— (No. 74-1052, decided December 19, 1974) (slip op. at 5-7).[2]

[1] Except where inconsistent with a federal statute or prior practice, the Federal Rules of Civil Procedure apply to habeas corpus proceedings. Rule 81(a)(2), F.R.C.P.

[2] The 1948 amendments to 28 U.S.C. § 1653 were made for the express purpose of "permit[ting] amendment of all jurisdictional allegations instead of merely allegations of diversity of citizenship as provided by [former] section 399 of title 28, U.S.C., 1940 ed." H.R. Rep. No. 308, 80th Cong., 1st Sess. at A-145 (1947).

We have demonstrated, both in our opening and reply briefs, that the District Court had jurisdiction to entertain appellant's application for a writ of habeas corpus. If this Court agrees, the jurisdictional allegations of appellant's application are not defective, and this motion becomes moot. We also pointed out, however, that the District Court had power to award declaratory and other relief without regard to the availability of the writ of habeas corpus (Appellant's Brief at 16 n.19; Appellant's Reply Brief at 4-12). If, contrary to our argument, the Court concludes that 23 D.C. Code § 110(g) bars habeas corpus relief but accepts the Government's concession that other forms of relief are available in the District Court, the sufficiency of our jurisdictional allegations will be placed in issue. It may be that no additional jurisdictional allegations are needed to support declaratory relief, *Sobell* v. *Attorney General*, 400 F.2d 986, 989 (3 Cir.), *cert. denied*, 393 U.S. 940 (1968), but if the Court concludes otherwise, this motion should be granted so that this case may be decided on its merits.

Because consideration of this motion is inextricably linked with the jurisdictional issues which have been fully briefed by the parties, we respectfully suggest that the Court hold this motion in abeyance pending argument and disposition of this case.

WHEREFORE, if appellant's jurisdictional allegations are deemed defective, this motion should be granted and appellant should be granted leave to amend those allegations as set forth herein.

Respectfully submitted,

FRANK F. FLEGAL
600 New Jersey Avenue, N.W.
Washington, D. C. 20001

Attorney for Appellant

Certificate of Service

A copy of the foregoing motion has been personally delivered to the office of the United States Attorney, United States Courthouse, Washington, D. C. 20001, this 28th day of January, 1975.

FRANK F. FLEGAL
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Washington, D. C. 20001

Attorney for Appellant

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-1832

(Habeas Corpus No. 31-73)

ROOSEVELT F. PALMORE, APPELLANT

v.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA, ET AL., APPELLEES

OPPOSITION TO APPELLANT'S MOTION FOR LEAVE TO AMEND JURISDICTIONAL ALLEGATIONS

Appellees respectfully oppose appellant's motion for leave to amend the jurisdictional allegations of his allegations of his initial application for a writ of habeas corpus filed in the United States District Court for the District of Columbia on May 15, 1973.

I

On May 15, 1973, appellant filed an application for a writ of habeas corpus in the District Court along with a memorandum of points and authorities in support of that application. An order to show cause was issued by the court on May 16; the return and answer of the respondents was subsequently filed on June 4. On June 15 appellant filed a reply memorandum. The court heard argument on appellant's application on June 18; appellant later filed supplemental memoranda on June 21 and July 13, 1973. In each of these pleadings appellant's entire effort was directed toward the issuance of a writ of habeas corpus by the District Court.

On July 10, 1974, the Honorable Joseph C. Waddy entered an order discharging the rule to show cause and dismissing appellant's petition for a writ of habeas

corpus. This appeal followed. In his initial brief in this Court appellant asserted that this Court had jurisdiction of his appeal pursuant to 28 U.S.C. § 2253, the provision dealing with the appeal of decisions in habeas corpus proceedings.

Appellant now seeks to amend his initial application to the District Court under 28 U.S.C. § 1653 to allege jurisdiction of that court pursuant to 28 U.S.C. § 1331—asserting a federal question arising under the Fourth Amendment involving more than $10,000 in damages—and, in addition, he requests relief under 28 U.S.C. §§ 2201-2202, the provisions enabling the federal courts to issue declaratory judgments. We strenuously oppose any such amendment.

II

28 U.S.C. § 1653 provides:

> Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts.

Appellant contends in his motion that this provision entitles him at this juncture to amend his initial application for a writ of habeas corpus to include, in the jurisdictional allegations of that petition, an assertion of federal question jurisdiction and a claim for declaratory relief. This position is simply contrary to the controlling case law in this and other jurisdictions.

The purpose of section 1653 is to allow a party to avoid dismissal of his cause of action on purely technical grounds. *Moore* v. *Coats Co.*, 270 F.2d 410, 412 (3d Cir. 1959).[1] However, the amendment which appellant seeks

[1] In *Moore* the court permitted the amendment of a complaint to include an additional party, thereby perfecting venue in the District Court. The court noted that the plaintiff in that action was appearing *pro se*, and since he was unskilled in the law, his pleadings should be liberally construed. 270 F.2d at 411. In the instant case, appellant is represented by very distinguished counsel, as he was in the trial court. Consequently, there is not the same need to make allowances as in the case of a *pro se* litigant. In any event, as we shall show, amendment of the type requested here is improper even under a liberal construction of the statute.

in his pending motion is far more than a mere technical amendment to cure a technical jurisdictional defect. Rather, appellant now seeks to raise new and fundamentally different grounds for the jurisdiction of the District Court. Such an amendment should not be allowed in this Court following dismissal of appellant's action by the District Court.

As the Tenth Circuit noted in *Brennan* v. *University of Kansas*, 451 F.2d 1287, 1289 (10th Cir. 1971):

> The power of the appellate court to correct defective jurisdictional allegations [under 28 U.S.C. § 1653] concerns defects of form, not substance. [Footnote omitted.]

An appellate court "cannot consider a 'new issue, not raised by the pleadings in the District Court or considered by it,' whether raised by motion to amend a complaint or otherwise." *First National Bank of Cincinnati* v. *Pepper*, 454 F.2d 626, 636 (2d Cir. 1972) (citation omitted); *cf. Champ* v. *Atkins*, 76 U.S. App. D.C. 15, 16-17, 128 F.2d 601, 602-603 (1942).[2]

[2] The cases relied upon by appellant in his motion do not support his contention on close examination. In both *Tatum* v. *Laird*, 144 U.S. App. D.C. 72, 444 F.2d 947, *rev'd*, 408 U.S. 1 (1972), and *Childs* v. *United States Board of Parole*, D.C. Cir. No. 74-1052, decided December 19, 1974, this Court relied upon a provision of the District of Columbia Code, 11 D.C. Code § 521, which established the United States District Court for the District of Columbia as a court of general equity jurisdiction, and noted, therefore, that, even if this jurisdictional basis was not properly pleaded, the local court clearly had jurisdiction over the subject matter of the proceeding. Since the District of Columbia Court Reform and Criminal Procedure Act of 1970 took effect on February 1, 1971, however, the jurisdictional basis relied upon in those decisions no longer exists. *See Tatum* v. *Laird*, *supra*, 144 U.S. App. D.C. at 75 n.5, 444 F.2d at 950 n.5.

Similarly, *Mantin* v. *Broadcast Music, Inc.*, 248 F.2d 530 (9th Cir. 1957), and *Blanchard* v. *Terry & Wright, Inc.*, 218 F. Supp. 910 (W.D.Ky. 1963), *aff'd*, 331 F.2d 467 (6th Cir. 1964), were cases in which the facts pleaded or presented to the court showed that it had jurisdiction, but the pleadings did not properly allege the jurisdictional bases.

In the instant case, we submit, appellant is not simply attempting to cure an imperfect pleading. Rather, he is no presenting to this

Moreover, there is an additional ground on which appellant's motion should be denied: it is clearly unlikely that the amendment which appellant now seeks to offer will avail him in his cause of action. *E.g.*, *Brennan* v. *University of Kansas*, *supra*, 451 F.2d at 1289. Appellant asserts that, if he is granted leave to amend his initial petition, he may well prevail in an action for monetary damages within the court's federal question jurisdiction under 28 U.S.C. § 1331. In addition, he argues, he should be able to obtain declaratory relief even if the District Court lacks habeas corpus jurisdiction.

With respect to appellant's potential suit for monetary damages, while he could conceivably recover for the alleged deprivation of his constitutional rights, the likelihood of such a recovery on the facts of this case is so remote as to defy quantitative analysis. It must be remembered that the police officers were acting in accordance with prior precedent when they stopped appellant,[3] and their actions were later approved by the local court of appeals.[4]

Appellant argues at some length in his reply brief that his action could have been maintained under the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202. This position, however, is simply not in accord with the relevant authority. As this Court clearly stated in *Clark* v. *Memolo*, 85 U.S. App. D.C. 65, 68, 174 F.2d 978, 981 (1949):

> The action for declaratory judgment is not suitable and does not lie in the District of Columbia in such cases as a substitute for a motion to vacate or to correct the sentence in the court where it was imposed, or as a substitute for habeas corpus in the district where the unlawful detention occurs, or as a substitute for a new trial or appeal.

Court an entirely new jurisdictional basis for his claim. Such tardy introduction of legal theories which were never presented to the District Court should not be allowed.

[3] *See Mincy* v. *District of Columbia*, 218 A.2d 507 (D.C. Ct. App. 1966).

[4] *Palmore* v. *United States*, 290 A.2d 573, 580-584 (D.C. Ct. App. 1972).

See also Ruip v. *Kentucky*, 400 F.2d 871, 872 (6th Cir. 1968), *cert. denied*, 395 U.S. 911 (1969); *United States ex rel. Bennett* v. *Illinois*, 356 F.2d 878 (7th Cir.), *cert. denied*, 384 U.S. 946 (1966).

It is clear, as we have argued in our brief, that appellant has an appropriate statutory remedy under 23 D.C. Code § 110 to challenge the legality of his conviction. Under such circumstances he should not be allowed to seek declaratory relief and thereby avoid the statutory remedy which Congress has provided. *Cf. Clausell* v. *Turner*, 295 F. Supp. 533, 536-537 (S.D.N.Y. 1969). Particularly in the instant case, because Congress has specifically precluded any court other than the Superior Court from jurisdiction to consider collateral attacks on judgments of conviction entered in that court, it would totally frustrate the congressional purpose to allow appellant to bring an action for declaratory relief in the District Court.[5]

[5] Despite appellant's assertions to the contrary, there is no authority to support his contention that declaratory relief should be available to him under the circumstances of this case. Rather, as the cases cited above show, collateral relief under 23 D.C. Code § 110 is his exclusive remedy. The cases cited in appellant's reply brief (Appellant's Reply Brief at 8-12) do not support his contention. For example, *Brownell* v. *Tom We Shung*, 352 U.S. 180 (1956), and *Shaugnessy* v. *Pedreiro*, 349 U.S. 48 (1955), were immigration cases involving challenges to administrative orders of deportation or exclusion. The Supreme Court held that such administrative orders were subject to review either in actions for declaratory judgments or on petitions for writs of habeas corpus. Such declaratory relief as was available was held to emanate from the Administrative Procedure Act. This Court similarly held in *Hurley* v. *Reed*, 110 U.S. App. D.C. 32, 288 F.2d 844 (1961), that a decision of the United States Board of Parole could be challenged in an action for a declaratory judgment. The important distinction between these cases and the instant case, however, which appellant ignores, is that these cases involved decisions of an administrative agency and thus were amenable to declaratory relief because of the Administrative Procedure Act, whereas the instant case involves no administrative decision. For a helpful discussion of this distinction, *see Clausell* v. *Turner*, *supra*, 295 F. Supp. at 536-537.

[Footnote continued on page 56]

Thus it is plain not only that appellant's proposed amendment is improper under 28 U.S.C. § 1653, but also that, even if his motion were granted, his amendment would not avail him in his cause of action.

WHEREFORE, appellees respectfully submit that appellant's motion for leave to amend jurisdictional allegations should be denied.

/s/ Earl J. Silbert
EARL J. SILBERT
United States Attorney

/s/ John A. Terry
JOHN A. TERRY
Assistant United States Attorney

/s/ Albert H. Turkus
ALBERT H. TURKUS
Assistant United States Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a copy of the foregoing Opposition has been mailed to counsel for appellant, Frank F. Flegal, Esquire, 600 New Jersey Avenue, N.W., Washington, D.C. 20001, this 3rd day of March, 1975.

/s/ Albert H. Turkus
ALBERT H. TURKUS
Assistant United States Attorney

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[5] [Continued]

Appellant also cites *Rose* v. *McNamara*, 252 F. Supp. 111 (D.D.C. 1966), *aff'd*, 126 U.S. App. D.C. 179, 375 F.2d 924 (1967), in support of his contention that declaratory relief should be available to him. While there is no discussion in either of the *Rose* decisions of the reason why declaratory relief was thought to be available, it would appear that declaratory relief was appropriate rather than habeas corpus in that particular case because the petitioner was not incarcerated but had only been fined as a result of her conviction. At the time of that decision, prior to the establishment of expanded notions of "custody" by the Supreme Court, it is likely that habeas corpus would not have been available to the petitioner.

ATTACHMENT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1974

[Filed, May 21, 1975; Hugh E. Kline, Clerk]

[Filed, Sep. 3, 1975; James F. Davey, Clerk]

Habeas Corpus #31-73

No. 74-1832

ROOSEVELT F. PALMORE, APPELLANT

v.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA, ET AL.

Before: Bazelon, Chief Judge; Wright, McGowan, Tamm, Leventhal, Robinson, MacKinnon, Robb and Wilkey, Circuit Judges

ORDER

On consideration of appellant's motion for leave to amend jurisdictional allegations, and of the opposition thereto, it is

ORDERED by the Court, *en banc*, that appellant's motion for leave to amend jurisdictional allegations is granted.

Per Curiam

A true copy:

Test: Hugh E. Kline, Clerk
United States Court of Appeals
for the District of Columbia Circuit

By: /s/ Catherine Carr, Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Habeas Corpus No. 31-73

[Filed, Sep. 3, 1975; James F. Davey, Clerk]

ROOSEVELT F. PALMORE, APPLICANT

v.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA, ET AL., RESPONDENTS

APPLICANT'S AMENDED JURISDICTIONAL ALLEGATIONS

Pursuant to 28 U.S.C. § 1653, and in accordance with the leave granted to applicant by the United States Court of Appeals for the District of Columbia Circuit, applicant hereby amends the jurisdictional allegations set forth in paragraph 3 of his application for writ of habeas corpus as follows:

3. This Court has jurisdiction to entertain this application and issue the writ of habeas corpus as prayed herein pursuant to 28 U.S.C. §§ 2241 *et seq.* Jurisdiction is also invoked under and by virtue of Article I, § 9, cl. 2 and Article III of the Constitution of the United States and 28 U.S.C. § 1651. Alternatively, this action arises under the Fourth Amendment to the Constitution of the United States, involves an amount in controversy which exceeds the sum of ten thousand dollars ($10,000), and this Court has jurisdiction pursuant to 28 U.S.C. § 1331. There exists between the parties an actual controversy, and this Court has power to declare the respective rights of the parties, and to award such

other relief as may be necessary and proper, pursuant to 28 U.S.C. §§ 2201-2202.

/s/ Frank F. Flegal
FRANK F. FLEGAL
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
Attorney for Applicant

II. *Swain* v. *Pressley*

RELEVANT DOCKET ENTRIES

Date	Entries	Judge
May 11, 1973	Petition for Writ of Habeas Corpus c/s 5/9/73.	
May 11, 1973	Petition for leave to file and prosecute in forma pauperis; Affidavit.	
May 11, 1973	Order authorizing filing and directing respondent to show cause on or before the 5th day after service. (signed 5/10/73).	Judge McGuire
May 11, 1973	Rule to show cause & copies issued to: Swain ser: 5/15/73 U.S. Attorney ser: 5/15 Corporation Counsel ser: 5/16	
May 21, 1973	Answer by respondent to petition for writ of Habeas Corpus and Rule to show cause; c/m 5/21/73. Appearance of Donald F. Rosendorf, Asst. Corp. Counsel.	
May 23, 1973	Order for writ of habeas corpus returnable June 11, 1973 at 10:00 A.M.; requesting Glenn L. Archer to represent petitioner.	Judge McGuire
May 25, 1973	Writ of Habeas Corpus & copies issued; ser: not served.	
June 6, 1973	Supplemental return and Answer of respondent to Rule to show cause; c/m 6-6-73. Appearance of Tobey W. Kaczensky.	
June 8, 1973	Order continuing hearing on cause set for June 11, until 9:30 A.M. July 9, 1973.	Judge Sirica

* * * *

Date	Entries	Judge
July 9, 1973	Reply of petitioner; Exh. A, B, C; c/sr 7/9/73	
July 12, 1973	Answer of respondent to reply of petitioner; p/s 7/12/73; Exhibit.	
July 18, 1973	ORDER discharging rule to show cause; dismissing petition. Court does not have jurisdiction over this matter by virtue of 23 D.C. Code 110(g).	Judge Gesell
July 25, 1973	ORDER dated 7-24-73 appointing Glenn L. Archer, Jr., counsel for deft. Nunc Pro Tunc 5-23-73. Filed. #263370	Judge Gesell
Aug. 13, 1973	NOTICE of Appeal by petitioner from order of July 18, 1973. Copies to: U.S. Attorney; Corporation Counsel; U.S.C.A.; 67371	

* * * *

Jan. 22, 1974	CERTIFIED copy order U.S.C.A. appointing Robert Weinberg, Esq. as counsel to represent appellant.	
Nov. 12, 1974	MEMORANDUM clarifying Court's Order of 7/18/74 dismissing petition for issuance of writ of habeas corpus	Judge Gesell
Nov. 1, 1974	CERTIFIED copy order of U.S.C.A. remanding record to U.S.D.C. for clarification of the order dated July 18, 1974.	
Nov. 14, 1974	SUPPLEMENTAL RECORD on remand returned to U.S.C.A. receipt askn. (73-1975).	
Feb. 3, 1975	TRANSCRIPT of proceedings July 16, 1973: Pages 1-19. (Ida Z. Watson reporter).	
July 31, 1975	Certified copy of judgment U.S.C.A. reversing and remanding cause to the U.S. District Court. Opinion attached.	

* * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Habeas Corpus No. 30-73

[Filed May 1, 1973, James F. Davey, Clerk]

JASPER C. PRESSLEY, Box 12, Lorton, Virginia 22079,
PETITIONER

v.

C. L. SWAIN, Superintendent, Lorton Correctional Complex, Box 25, Lorton, Virginia 22079, RESPONDENT

PETITION FOR ISSUANCE OF
WRIT OF HABEAS CORPUS

Comes now, the Petitioner, Jasper C. Pressley, and in accordance with Title 28, U.S.C. Sections 2241-2243, respectfully moves this Honorable Court to issue a writ of Habeas Corpus and for cause states as follows:

1. In February 1971, the Petitioner's house was searched in compliance with an affidavit in support of a search warrant for the entire premises of 6809 9th Street, N.W. in Washington, D.C. for the charge: RECEIVING STOLEN PROPERTY IN VIOLATION OF THE DISTRICT OF COLUMBIA CODE, TITLE 22, SECTION 2205. In that, two (2) Metropolitan Police Badges, one (1) purported to have been stolen in January 1970, *prior to the employment of the Petitioner* at the Pilot District Project and the other in October 1970 from the locker room of the Third District Headquarters, where the *Petitioner never been nor had access*, and one (1) *IBM Electric Typewriter serial number 6238665*, purported to have been reported stolen from the Pilot District Project's office between the hours of 7:30 p.m. and 11:00 a.m. on Friday and Saturday, November 13 and 14th respectively. An IBM Selectric Typewriter serial number 5613255 was taken from the premises of the Petitioner. A call was made

to the office of the Pilot District Project by one Lt. Keahon from the Petitioner's premises, to check on typewriter #5613255. There was no report of such a typewriter being stolen or missing from the Pilot District Project but said typewriter was taken by said Police Lieutenant for the purpose of checking on it. The Petitioner was not arrested nor was he detained for interrogation.

2. On February 9, 1971, the Petitioner was indicted secretly by a Grand Jury of the District of Columbia Superior Court on charges of; and in violation of: Grand Larceny (22 D.C. Code 2201), Larceny from the District of Columbia Government (22 D.C. Code 2206) and Receiving Stolen Property (22 D.C. Code 2205). After a trial by jury before the Honorable Tim C. Murphy on April 20, 21 and 22, 1971, the Petitioner was found guilty of Grand Larceny and Larceny from the District of Columbia Government and not guilty of Receiving Stolen Property. On October 1, 1971, the court sentenced the Petitioner to concurrent prison terms of thirty-two to ninety-six months for grand larceny and twenty months to five years for larceny from the District of Columbia Government. Petitioner appealed from the conviction whereby his court appointed Attorney Michael F. X. Dolan, presented argument on *PERJURIOUS TESTIMONY*, an issue not presented at trial level. On May 22, 1972, the District of Columbia Court of Appeals entered a judgment affirming the conviction in *Pressley* v. *United States*, No. 6063, stating, "No constitutional issues were involved."

3. June 5, 1972, the Petitioner filed a motion for a new trial *pro se* claiming *inter alia* that he was denied the effective assistance of counsel. June 6, 1972, Judge Murphy denied the motion without a hearing. An appeal followed.

4. The Petitioner's argument was and remains, that:

THE PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE SIXTH AMENDMENT IN THAT TRIAL COUNSEL'S GROSS INCOMPETENCE BLOTTED OUT THE ESSENCE OF A SUBSTANTIAL DEFENSE, AND PETI-

TIONER'S CONVICTIONS BEING BASED, IN PART, UPON PATENTLY PERJURED TESTIMONY.

Ineffective assistance of trial counsel, to be violative of the Constitution, must be so grossly incompetent as to blot out the essence of a substantial defense. *Bruce* v. *United States*, 126 U.S. App. D.C. 336, 379 F. 2d 113 (1967); *Scott* v. *United States*, 138 U.S. App. D.C. 339, 427 F. 2d 609 (1970). In the case before this Court, trial counsel acted in such a manner.

The most flagrant illustration of trial counsel's incompetence was his failure to move to suppress as evidence the typewriter allegedly stolen by Appellant. Facing a similar fact situation, the Supreme Court of California, speaking through Justice Traynor, held that "it is counsel's duty to investigate carefully all defenses of fact and of law that may be available to the Defendant, and if his failure to do so results in withdrawing a crucial defense from the case, the Defendant has not had the assistance to which he is entitled. *People* v. *Ibarra*, 34 Cal. Rptr. 863, 386 P. 2d 487, 490 (1963). In the *Ibarra* case, the Supreme Court overturned a conviction because trial counsel failed to voice any objection to the admission of heroin allegedly taken from Defendant's person. A motion to supress in the present case could have been based upon lack of probable cause for issuance of a search warrant and on improper execution of said warrant.[1] The probable cause issue was important because the Affidavit in support of said warrant was based on the testimony of one Roman S. Dixon, who was arrested on January 27, 1971 and charged with grand larceny, a charge to which he admitted his guilt. Mr. Dixon also admitted stealing a Metropolitan Police Officer's badge which he utilized during the commission of said offense. After he was arrested and had issued a confession, he assisted the police in recovering property which had been stolen by him. This according to Officer Richard Hayden and the Superior Court Judge

[1] See Grand Jury Minutes dated February 8, 1971, line 8 thru 16, and Lt. Keahon's testimony at (Tr. 110-111) in addition to Dixon's (Tr. 72-73). Each has a different statement.

who authorized the issuance of the search warrant caused Roman Dixon to be a reliable informer. A man who steals property from others, and after he is arrested and has admitted to the larceny, helps the police recover the property which he has stolen, suddenly becomes a reliable informer. The United States Supreme Court has said that "although an Affidavit may be based on hearsay information . . . the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the [typewriter] was where he claimed it was, and some of the underlying circumstances from which the officer concluded the informant . . . was credible or his information reliable." *Aguilar* v. *Texas*, 378 U.S. 114 (1963). The Affidavit in this case was not corroborated in any way by outside sources, and yet the issuing magistrate felt that this confessed criminal was credible and reliable. See *Spinelli* v. *United States*, 393 U.S. 410 (1968). It is also clear that this case did not involve danger to either police officers or the innocent public, thereby reducing the standards necessary for a search and seizure. *Murphy* v. *United States*, D.C. Appeals No. 6226 (Aug. 10, 1972); *Adams* v. *Williams*, —— U.S. ——, 32 L.Ed. 2d 612 (1972). At the very least, there is a substantial question as to whether there were proper grounds for issuance of a search warrant, and yet no motion to suppress, here basic to the essence of a criminal defense, was ever raised by trial counsel.[2]

There were other grounds which could have been raised at the trial level in a motion to suppress evidence. A typewriter, in and of itself, is neither an unusual household item, nor an illegal one. To describe the typewriter as an IBM Electric, Serial Number 6238665 is specific enough, but in fact, the typewriter seized from the prem-

[2] See Affidavit and Search Warrant. Police Badges missing *prior* to employment of Petitioner at Pilot District Project (EMPHASIS ADDED). Petitioner was not detained upon seizure of typewriter #5613255 and if it had been ascertained that said typewriter was stolen or missing, the Petitioner would have been arrested upon the seizure. See Officer Haydn statement before Grand Jury dated 8 February 1971, line 8-16.

ises was an IBM *Selectric*, Serial Number 5613255. Thus there was an improper execution of the search warrant, particularly in light of the fact that the object of the search was a typewriter, a common household item. The issue before this Court is not whether a motion to suppress would have been successful, but rather that because it was not made at the trial level, it can not be raised on appeal, and thus Appellant has been denied the assistance of counsel guaranteed under the Constitution.

There were other ways in which trial counsel was ineffective. A crucial question in any trial for the charge of grand larceny is the value of the allegedly stolen property. In the case before this Court, a government witness testified that the typewriter in question cost $495.00 when purchased in 1969. However, there was no testimony to the precise value of the property at the time it was stolen and there were no vouchers of cost nor of ownership presented at trial as evidence. Trial counsel failed to seek an expert witness who might testify to a substantially lower valuation or if the typewriter was in ordinary working condition to justify a charge of grand larceny. This was ineffective of counsel.[3] A. K. Ramson v. U.S. (1964, 337 F. 2d 550, 119 U.S. App. D.C. 154, states that "Without evidence of value of article involved, charge of Grand Larceny is inadequate to sustain finding of jury that it was of value of $100 or upward

The counsel also failed to have any expert fingerprinter to verify that finger prints could have been taken off the typewriter in opposition to governments argument that no fingerprints could be taken from the typewriter, trial counsels concurrence would have revealed the petitioner's innocence.

Trial counsel failed to object at Voir Dire when a prospective juror rose in the open court and stated that she had seen petitioner in court on a previous occasion. Trial counsel did not object to the indictments handed

[3] In Grand Larceny prosecutions, instructions on petit larceny is unnecessary where *NOTHING IN EVIDENCE* indicates value of less than $100. W. Chew v. U.S. (1962, 298 F.2d 334, 112 U.S. App. D.C. 6).

down by the Grand Jury when it appeared on the face of two separate indictments that the signatures of the United States Attorney for the District of Columbia were patently different.[4] Further, counsel made no serious attempt to impeach the witness Dixon with regard to the spraypaint on the typewriter, when it was clear that this testimony was in conflict with other government witnesses.[5]

The ineffective assistance described above is not merely a reassessment by hind sight of the strategy decisions of defense counsel. Under the *Bruce* case, supra., this would not be a proper standard for a reviewing court. Nor is this case similar to *Edwards* v. *United States*, 103 U.S. App. D.C. 152, 256 F. 2d 707 (1958), because that case involved a plea of guilty rather than an extensive criminal trial, and the decision to plead guilty was arrived at after discussion between the Defendant and his counsel. A distinction must be made between improvident strategy and lack of investigation, when the latter amounts to ineffective assistance of counsel. In *Coles* v. *Peyton*, 389 F. 2d 224 (1968), as in this instant case before the Court, the United States Court of Appeals for the Fourth Circuit held that the Petitioner was denied effective assistance of counsel when his trial counsel failed to investigate matters which were crucial to the defense of a charge of rape in the State of Virginia.

The opinion of this Court should not affect or be affected by the fact that trial counsel was retained by the Petitioner. A double standard of effectiveness required under the Constitution would be inconceivable. Because the petitioner seeks his own counsel should not relax any Constitutional protection to which he is otherwise en-

[4] Count 1 & 2 are identical and the signature of the DA is *FORGED*; in that no initial indicates the signee even if authorization was given. As the indictment stands, anyone, anywhere can sign the DA's signature without indicating *WHO* signed it. Further, if the Ass't are authorized to sign the DA's signature, WHY did the DA sign #9227-71 himself?

[5] See Dixon (Tr. 72) Keahon (Tr. 107-08) *PERJURED TESTIMONY*.

titled. Holland v. Boles, 225 F. Supp. 863 (N.D.W.Va., 1963)

CONCLUSION

The Petitioner respectfully urges this Court to grant his petition and order the Respondent in this cause to show the legality of the detainment of the Petitioner, and, should the allegations and facts herein presented prove as stated, Petitioner humbly prays that this Court will move as law and justice provide to discharge the Petitioner from confinement. Further, it is arguable that the trial judge should have recognized the illegal nature of the seizure and raised the issue himself. When essential integrity of the judicial process is at state, an experienced trial judge should take the necessary action to assure a fair hearing. That the trial Judge has that power is implied in many decisions regarding the effective representative of counsel which holds that the incompetency of counsel must be of the sort of which the trial court may take cognizance and which it has a duty to correct. Davis v. Bomer, 349 F. 2d 84 (6th Cir.) Cert. Denied 382 U.S. 883, 86 S. Ct. 177, 152 L Ed 2d 124 (1965); U.S. v. ex rel Darcy v. Hardy, 202 F. 2d 407 (3rd Cir. 1953).

Respectfully submitted,

/s/ Jasper C. Pressley
JASPER C. PRESSLEY
Box 12
Lorton, Virginia

CERTIFICATE OF SERVICE

I, hereby certify that a copy of the foregoing Petition for Leave to File and Prosecute and Petition for the Issuance for a Writ of Habeas Corpus in Forma Pauperis, was mailed, postage prepaid to the Attorney for the District of Columbia, at his office, U. S. Courthouse, Washington, D. C. this 9th day of May 1973.

/s/ Jasper C. Pressley

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Habeas Corpus No. 30-73

[Filed, May 11, 1973; James F. Davey, Clerk]

JASPER C. PRESSLEY, PETITIONER

vs.

C. L. SWAIN, RESPONDENT

ORDER AUTHORIZING FILING AND DIRECTING RESPONDENT TO SHOW CAUSE

It is this 10th day of May, 1973,

ORDERED that the petition be filed without prepayment of costs.

IT IS FURTHER ORDERED that the respondent either in person or by counsel appear in the Court on or before the 5th day after service of a copy of this order and of the petition upon him and make return to said petition and show cause, if any he has why the Writ of Habeas Corpus should not issue.

IT IS FURTHER ORDERED that the respondent serve on the petitioner by mail a copy of his answer to this rule.

The Clerk is directed to furnish the United States Marshal with a copy of this order and of the petition for the purpose of making such service.

/s/ Matthew F. McGuire
Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Habeas Corpus No. 30-73

[Filed, May 21, 1973; James F. Davey, Clerk]

JASPER C. PRESSLEY
Box 12
Lorton, Virginia 22079
PETITIONER

v.

C. L. SWAIN, Superintendent
Lorton Correctional Complex
Box 25
Lorton, Virginia 22079
RESPONDENT

ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS AND RULE TO SHOW CAUSE

For answer to Petition for Writ of Habeas Corpus and rule to show cause thereon, counsel for respondent, C. L. Swain, represents to the Court that the matters complained of therein do not amount to gross incompetence on the part of petitioner's trial counsel and, accordingly, there is no basis for granting the petition.

Petitioner alleges several grounds for his contention that trial counsel was grossly incompetent. He alleges a failure to attack the validity of the search warrant but admits that the informant who provided information which served as the basis for the affidavit had helped the police recover stolen property in another case. Since the informant had proved to be reliable in the past by leading police to stolen property this would meet the test of *Jones* v. *United States*, 362 U.S. 257 (1960). In any event, the decision as to whether an attack upon the validity of the warrant would be worthwhile is subjective in nature and totally within the discretion of counsel.

Petitioner also states that there was no precise testimony as to the value of the stolen typewriter at the time

it was recovered although there was testimony as to its worth in 1969 which was $495.00. For the purposes § 22-2201, D.C. Code, 1967 ed., the exact value of the item would, in any event, be irrelevant.

Petitioner's complaints, in essence, amount to after the fact dissatisfaction with strategic and tactical decisions of trial counsel. In *Scott* v. *United States of America*, 427 F.2d 609 (D.C. Cir. 1970) the court noted that "the appropriate standard for ineffective assistance of counsel . . . is whether gross incompetence blotted out the essence of a substantial defense." Petitioner's allegations do not rise to this test and he has not met his burden of "showing requisite unfairness" of the trial as required by *Bruce* v. *United States*, 126 U.S. App. D.C. 336 (D.C. Cir., 1967). In order to prevail, petitioner must show that counsel lacked "the minimum standards of competence necessary to satisfy appellant's constitutional right to counsel." *Bruce*, supra.

Petitioner was represented at trial by counsel of his own choosing. In *Anderson* v. *Brennan*, 250 F.2d 654 (6th Circ., 1958) the petitioner complained of incompetent representation of retained counsel in that he did not object to the introducing of evidence which may have been the basis of his conviction for armed robbery. The court stated:

> "[W]e must keep in mind that appellants were represented by counsel of their own choosing . . . In the aftermath of a trial, it is often found that even the most able of counsel may have erred in some respects . . . To justify a writ of habeas corpus on the ground of incompetence of counsel, an extreme case must be disclosed, considerably more than inadequacy of representation by counsel of one's own choosing."

Finally, it should be noted that petitioner does not complain of the services rendered by his court appointed counsel on appeal. The issues raised by this petition, had they been of substance, could have been raised on appeal. After hearing oral argument, the District of Columbia Court of Appeals, No. 6063, affirmed the conviction and, according to petitioner, stated "no constitutional issues were involved." In the *Anderson* case, supra, the court stated that "habeas corpus cannot be used as a substitute for appeal for the purpose of attacking the validity of state court rulings not involving constitutional questions."

WHEREFORE, it is respectfully submitted that the Petition for Writ of Habeas Corpus should be denied and that the Rule to Show Cause thereon should be discharged.

/s/ C. Francis Murphy
C. FRANCIS MURPHY
Corporation Counsel, D.C.

/s/ John A. Earnest
JOHN A. EARNEST
Assistant Corporation Counsel, D.C.

/s/ Donald F. Rosendorf
DONALD F. ROSENDORF
Assistant Corporation Counsel, D.C.
Attorneys for the Respondent
District Building
Washington, D.C. 20004

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Answer to Petition for Writ of Habeas Corpus and Rule to Show Cause was mailed, postage prepaid, to Jasper C. Pressley, Plaintiff pro se, Box 12, Lorton, Virginia, 22079, this 21st of May, 1973.

/s/ Donald F. Rosendorf
Assistant Corporation Counsel, D.C.
Attorney for the Respondent
District Building
Washington, D.C. 20004

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Habeas Corpus 30-73

(Superior Court Criminal Number 6733-71)

[Filed, Jun 6, 1973; James F. Davey, Clerk]

JASPER C. PRESSLEY, PETITIONER

v.

C. L. SWAIN, RESPONDENT

SUPPLEMENTAL RETURN AND ANSWER
TO RULE TO SHOW CAUSE

Comes now the respondent by his attorney, the United States Attorney for the District of Columbia, and makes the following supplemental answer to the rule to show cause:

1. By a three-count indictment filed on February 9, 1971, in the Superior Court, Criminal Number 6733-71, petitioner was charged with grand larceny (22 D.C.C. § 2201) larceny from the District of Columbia government (22 D.C.C. § 2206) and receiving stolen property (22 D.C.C. § 2205). After a trial by jury before the Honorable Tim C. Murphy on April 20, 21, and 22, 1971, petitioner was found guilty of grand larceny and larceny from the District of Columbia government and not guilty of receiving stolen property. On October 1, 1971, the court sentenced petitioner to concurrent prison terms of thirty-two to ninety-six months for grand larceny and twenty-months to five-years for larceny from the District of Columbia government. Petitioner, by counsel, appealed from his conviction. On appeal, petitioner argued principally that the variance in testimony between the government witnesses necessitated reversal. The District of Columbia Court of Appeals affirmed petitioner's conviction by order noting that the record disclosed no error

affecting the substantial rights of appellant. *Pressley* v. *United States*, Number 6063, May 22, 1972.

2. On June 5, 1972, fourteen months after his trial petitioner filed a *pro se* motion for a new trial. This motion was denied. Petitioner by counsel appealed. The issue presented on appeal was whether petitioner had been denied effective assistance of counsel because trial counsel had failed to move to suppress certain physical evidence introduced by the government. The District of Columbia Court of Appeals affirmed by order noting that trial counsel's determination not to move to suppress did not constitute professional incompetence. *Pressley* v. *United States*, Number 6631, March 2, 1973.

3. During the pendency of his appeal in that case, Number 6631, and after the affirmance of his conviction in Number 6063, petitioner filed a *pro se* motion in July of 1972 to compel production of the grand jury voting record in Superior Court Criminal Number 6733-71. On September 8, 1972, this motion was denied by the trial judge. Appointed counsel has appealed that order in the District of Columbia Court of Appeals Number 6803. The ground for the request for production of the grand-jury minutes appears to be an alleged difference in form between the signatures of the United States Attorney in Number 6733-71 and the signature on the indictment in an unrelated Superior Court Criminal case, Number 9227-71. The allegation appears to be that the alleged difference in some way taints the indictment. On March 22, 1973, the United States filed a motion for summary affirmance. The District of Columbia Court of Appeals has rendered no decision as yet.

4. Petitioner styles his present pleading a writ of habeas corpus. However, he indicates that the principal claim for relief is based on ineffective assistance of counsel. He also alludes to a further complaint that the evidence at trial was either not credible or insufficient. These two points appear to be substantially identical to those previously raised on appeal as outlined above. Petitioner also alleges that the indictment by which he was charged was defective. This issue is substantially identical to the one presently before the District of Columbia Court of Appeals in Number 6803.

5. This court lacks jurisdiction to entertain this petition. A collateral attack upon a conviction in the Superior Court may be brought only by a motion pursuant to 23 D.C.C. § 110 in the Superior Court; subsection (g) thereof expressly provides that a writ of habeas corpus shall not be entertained by the Superior Court or by any Federal or State Court if it appears that the applicant has failed to make a motion for relief to the sentencing court unless it appears that the remedy under § 110 is inadequate or ineffective. No reason appears why such motion would be inadequate or ineffective.

WHEREFORE, the respondent respectfully requests that the rule to show cause be discharged and that the petition be denied on the ground that this court lacks jurisdiction over this matter.

/s/ Harold H. Titus, Jr.
HAROLD H. TITUS, JR.
United States Attorney

/s/ Earl J. Silbert
EARL J. SILBERT
Principal Assistant U.S. Attorney

/s/ Oscar Altshuler
OSCAR ALTSHULER
Assistant United States Attorney

/s/ Tobey W. Kaczensky
TOBEY W. KACZENSKY
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing supplemental return and answer to rule to show cause has been mailed to Glenn L. Archer, Jr. 888 17th Street, N.W., Washington, D.C. 20006, this 6 day of June, 1973.

/s/ Tobey W. Kaczensky
TOBEY W. KACZENSKY
Assistant United States Attorney

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Habeas Corpus 30-73

[Filed Jul. 9, 1973, James F. Davey, Clerk]

JASPER C. PRESSLEY, PETITIONER

v.

C. L. SWAIN, RESPONDENT

REPLY OF PETITIONER

Petitioner, Jasper C. Pressley, by his court-appointed attorney, respectfully submits the following reply to respondent's (1) answer and (2) supplemental return and answer.

THIS COURT HAS JURISDICTION TO ENTERTAIN THIS PETITION FOR HABEAS CORPUS IN ACCORDANCE WITH TITLE 28, U.S.C. § 2241

Petitioner Has Complied With The Terms Of 23 D.C. Code § 110.

23 D.C.C. § 110 requires application for relief by motion to the sentencing court, in this case the Superior Court, before applying for a writ of habeas corpus. Petitioner filed such a motion when, on June 5, 1972, he filed a pro se motion for a new trial, raising the following questions: legality of the search and seizure, validity of the indictment, jurisdiction of the court, legality of his custody, and effectiveness of counsel. Judge Murphy denied the motion. Petitioner by counsel appealed. The issue on appeal was whether the assistance of counsel had been effective. The Court of Appeals affirmed. These procedural steps satisfy the requirements of 23 D.C.C. § 110, and the application for a

writ of habeas corpus is properly before the District Court.

Petitioner's Rights Should Not Be Denied Through Resort To Technicalities.

Although the petitioner filed a motion for a new trial rather than a motion to vacate, set aside, or correct the sentence as required by 23 D.C.C. § 110, such a technicality should not interfere with the petitioner's constitutional right to apply for a writ of habeas corpus. Petitioner's motion was filed pro se, and he could not be expected to be aware of the procedural prerequisites for application for habeas corpus and to fashion his motion before the Superior Court accordingly. The importance of a prisoner's access to the writ should override the significance of any distinction between a motion for new trial and the forms of collateral attack specified in 23 D.C.C. § 110.

In *Woods* v. *Rodgers*, 275 F. Supp. 559 (D.C. D.C. 1967), a hearing on a return to a writ of habeas corpus, the question was whether the District Court had jurisdiction or whether petitioner's remedy was by motion under 28 U.S.C. § 2255, a statute similar to 23 D.C.C. § 110. Judge Holtzoff stated:

> The Court is unable to perceive why the petitioner is proceeding by means of a petition for writ of habeas corpus instead of by motion under 28 U.S.C. § 2255 to set aside the sentence. The Court will, however, consider the present proceeding as though it was a motion under 28 U.S.C. § 2255, as well as a petition for writ of habeas corpus, because these technical refinements should not control the disposition of the petitioner's right. (id at 560)

See also *St. Clair* v. *Hyatt*, 83 F. Supp. 585 (D.C. Ga. 1949), where the judge treated petitioner's letter to him relating to the validity of the sentences as a motion under 28 U.S.C. § 2255.

In sum, therefore, petitioner's motion for a new trial satisfies the statutory requirements of 23 D.C.C. § 110,

and the grounds of petitioner's application should be considered on the merits by the District Court.

PETITIONER WAS DENIED HIS RIGHT TO DUE PROCESS AND HIS RIGHT TO EFFECTIVE COUNSEL AS GUARANTEED BY THE FIFTH AND SIXTH AMENDMENTS TO THE CONSTITUTION AS A RESULT OF AN AGGREGATION OF ERRORS COMMITTED BY HIS TRIAL COUNSEL

Petitioner's Trial Counsel Failed To Move For A Suppression Of Illegally Seized Evidence.

Petitioner was charged with and ultimately convicted of the crime of stealing a typewriter, the property of the District of Columbia. The sole basis for the indictment charging petitioner with this offense was the seizure pursuant to a search warrant by the Metropolitan Police from a house leased by petitioner.

The sole basis, in turn, for the issuance of the search warrant was information given to the Metropolitan Police by Roman C. Dixon contemporaneous with his arrest for grand larceny. According to the affidavit in support of the search warrant (Exhibit A) Dixon told the Metropolitan Police that on January 20, 1971, he had seen a bluish green IBM Selectric typewriter in the basement recreation room of petitioner's residence at 6809 Ninth Street, N.W., Washington, D.C. Further, according to the affidavit, a light green IBM Selectric typewriter serial #6238665 had been reported stolen on or about November 13 and 14, 1970, from the Pilot District Project, a community relations project sponsored by the District of Columbia, where both petitioner and Dixon were employed.

Based on this search warrant issued February 1, 1971, the Metropolitan Police on that same date searched petitioner's residence. Pursuant to that search, the Metropolitan Police discovered an IBM Selectric typewriter, serial #5613255, contained within a storage area

in petitioner's basement recreation room (Tr. 106).* As of the time of the seizure, petitioner stated he had no knowledge as to the existence of that typewriter or how it came to be placed in the crawl space (Tr. 111).

It was subsequently learned that an IBM typewriter, serial #5613255, had in fact been the typewriter reported missing on or about November 14, 1970, from the Pilot District Project, and that the IBM typewriter, serial #6238665, was not missing but was still on the premises of the Pilot District Project (Tr. 18-19).

As of petitioner's trial on April 20-22, 1971, certain facts were known which bore heavily on the reliability of the information supplied by Dixon to the Metropolitan Police. In November of 1971, both petitioner and Dixon lived in a house rented by petitioner at 1530 Spring Place, N.W., Washington, D.C. (Tr. 262-263). On about November 27, 1970, petitioner moved from this residence to 6809 Ninth Street, N.W., Washington, D.C. (Tr. 247, 310). Thereafter, on about January 20, 1971, in a combined move, petitioner moved his remaining furnishings and possessions from 1530 Spring Place to his residence at 6809 Ninth Street and Dixon moved from 1530 Spring Place, N.W. to 1410 Missouri Avenue, N.W. (Tr. 134, 138, 324-326). During the course of this move, Udolph R. Porter, who aided petitioner and Dixon in this combined move, saw Dixon place a green electric typewriter in the storage area, or crawl space, in petitioner's basement recreation room at 6809 Ninth Street (Tr. 137).

Earlier on the day of the move, Porter had seen the same typewriter in a closet in the basement apartment occupied by Dixon at the Spring Place residence (Tr. 146), and had seen Dixon carry the same typewriter from the rental truck that was being used in the move to the basement recreation room of petitioner's residence on Ninth Street (Tr. 137, 146, 150). Another person who aided petitioner and Dixon in the move, Rudolph Tate, saw Dixon adjusting the panel which had to be removed in order to gain access to the crawl space (Tr. 200).

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* "Tr." references are to the trial transcript.

Based on these facts, there was clearly sufficient grounds to move for a suppression from evidence of the seized IBM Selectric typewriter, serial #5613255. Such a suppression would have resulted in a dismissal of the charges against petitioner.

Petitioner's Trial Counsel Failed To Challenge The Propriety Of The Grand Jury Indictments Returned Against Petitioner.

In the course of the proceedings against petitioner, two separate indictments were returned against petitioner, the first one (Exhibit B) charging petitioner with theft of the above-described IBM typewriter, and the second (Exhibit C) charging petitioner with assault. On the face of these two indictments, the signature of the then United States Attorney, Thomas A. Flannery, appears materially different. This discrepancy in signatures clearly rebutts the presumption of regularity in these indictments as set forth in *Gaither* v. *United States*, 134 U.S. App. D.C. 154, 163-164 (1969), a point that was not raised by petitioner's trial counsel. Had these indictments proved to have been improper, the charges against petitioner would have been dismissed.

Petitioner's Trial Counsel Failed To Move For A Judgment Of Acquittal, On The Grounds That One Of The Government's Principal Witnesses, Roman C. Dixon, Apparently Committed Perjury.

During the course of the trial, there appeared substantial reason to believe that one of the government's principal witnesses, Roman C. Dixon, committed perjury.

In describing the typewriter seized from petitioner's residence, Lieutenant Keahon of the Metropolitan Police noted (Tr. 107-108) two separate sets of disclorations on the typewriter. One set of discolorations was white "sticky stuff" described as either paint or "some type of plaster". The other set of discolorations described by Lieutenant Keahon as bronze in color was identified as fingerprint dusting powder, which powder was put on the typewriter in the Metropolitan Police Department Crime

Lab after it had been removed from petitioner's residence.

In identifying the typewriter that he had seen in petitioner's residence, Dixon testified (Tr. 72) that he remembered seeing "white marks on it like somebody had been painting on top of it" and in addition some "spray paint, like they would use some kind of silver paint to spray in their hair". Apparently, Dixon was referring to the substance which was subsequently identified as fingerprint dusting powder, a substance which Dixon could not possibly have seen on the typewriter prior to its seizure from petitioner's residence. This discrepancy, coupled with the testimony of Udolph Porter (Tr. 146) that he had seen Dixon place the typewriter in the crawl space in petitioner's basement, strongly suggests the possibility that Dixon committed perjury, a possibility that was apparently never explored by petitioner's trial counsel. Had it been established that Dixon, a principal witness in the government's case against petitioner, had committed perjury, petitioner would have at the very least been granted a mistrial, if not had the charges against him dismissed.

Petitioner's Trial Counsel Failed To Object During Trial To The Introduction Into Evidence Of The Typewriter.

In addition to failing to move, preliminary to trial, to suppress from evidence the illegally seized typewriter, petitioner's trial counsel also failed during the course of the trial to object to the introduction of the typewriter into evidence. At the very least, in effort to preserve record for appeal, petitioner's trial counsel should have objected to the introduction into evidence of the typewriter. There was substantial reason to believe that the typewriter had been placed in petitioner's basement by Dixon, which, if true, would have resulted in a dismissal in the charges against petitioner. The failure of petitioner's trial counsel to either challenge Dixon's testimony or the introduction into evidence of the typewriter clearly deprived petitioner of a substantial defense.

SUMMARY OF ARGUMENT

The cumulative effect of the above-enumerated factors, (1) the failure to move for a suppression of illegally seized evidence, (2) the failure to challenge the propriety of the grand jury indictments, (3) the failure to move for a judgment of acquittal on the grounds of perjury of a government witness, and (4) the failure to object to the introduction into evidence of the typewriter, any one of which factors if successfully advanced would have resulted in a dismissal of the charges against petitioner, clearly resulted in a denial of petitioner's right to due process and right to effective counsel. Accordingly, it is respectfully submitted that there are sufficient grounds to warrant the issuance of a writ of habeas corpus in favor of petitioner.

/s/ Glenn L. Archer, Jr.
GLENN L. ARCHER, JR.
888 17th Street, N.W.
Washington, D.C. 20006

Appointed Counsel for
Petitioner

Of Counsel

Michael C. Durney
HAMEL, PARK, MCCABE & SAUNDERS
888 17th Street, N.W.
Washington, D.C. 20006

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Reply of Petitioner has this 9th day of July, 1973, been made on counsel by hand delivering a copy thereof to:

TOBEY W. KACZENSKY
Assistant United States Attorney
United States Courthouse
Washington, D.C. 20001

/s/ Michael C. Durney
MICHAEL C. DURNEY
HAMEL, PARK, MCCABE & SAUNDERS
888 17th Street, N.W.
Washington, D.C. 20006

EXHIBIT A

[Filed Jul[illegible], 1973, James F. Davey, Clerk]

SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
Criminal Division

SEARCH WARRANT

TO: P1.C Richard A. Hayden, Third District, Member of Metropolitan Police Department authorized to serve same.

Affidavit having been made before me by P1.C Richard A. Hayden, Third District (affidavit attached herewith) that he (has reason to believe) that (on the premises known as): For the entire premises of 6809 9th St., Washington, D.C. in the District of Columbia, there is now being concealed certain property, namely: Two MPDC Badges and IBM Electric Typewriter which are Title 22 Section 2205 D.C. Code (alleged grounds for seizure) and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the (premises) above described and that the foregoing grounds for application for issuance of the search warrant exist.

YOU ARE HEREBY COMMANDED TO SEARCH FORTHWITH the (place) named for the property specified, serving this warrant and making the search (in the daytime) and if the property be found there, to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized. Return this warrant and bring the property before me within ten days of this date, as required by law.

Dated this 1 day of Feb., 1971.

/s/ [Illegible]
Judge, Superior Court of
the District of Columbia

RETURN

I received the search warrant, detailed above February 1, 1971 and have executed it as follows:

On February 1, 1971 at 1430 o'clock 1430 Hr's. M. I searched the (premises) described in the warrant and I left a copy of the warrant with: Jasper Pressley (Name of person searched or owner of place of search) together with a receipt for the items seized.

The following is an inventory of property taken pursuant to this warrant:

#1 IBM Electric Typewriter Serial #5613255

This inventory was made in the presence of Jasper Pressley.

I swear that this inventory is a true and detailed account of all the property taken by me on this warrant.

/s/ P1C. Richard A. Hayden
MPDC

SUBSCRIBED AND SWORN TO BEFORE ME THIS —— DAY OF ————————, 19—.

————————
Judge, Superior Court of
the District of Columbia

[1] The Federal Rules of Criminal Procedure: "The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time." (Rule 41C).

AFFIDAVIT IN SUPPORT OF A DISTRICT OF COLUMBIA SUPERIOR COURT SEARCH WARRANT FOR ENTIRE PREMISES OF 6809 9th STREET, NORTHWEST, WASHINGTON, D.C. A ONE STORY BRICK RAMBLER TYPE DWELLING OCCUPIED BY JASPER LEE PRESSLEY.

CHARGE: RECEIVING STOLEN PROPERTY IN VIOLATION OF THE DISTRICT OF COLUMBIA CODE, TITLE 22, SECTION 2205

Roman S. Dixon, male, 21 years of age, 1410 Missouri Avenue, Northwest, Washington, D.C. was arrested at 1:30 P.M., Thursday, January 27, 1971 at 1624 V Street, Northwest, Washington, D.C. (Third District Headquarters). The defendant (Dixon) was charged with Grand Larceny on arrest warrant #USW 536-71 (District of Columbia Court of General Sessions Warrant).

The defendant (Dixon) admitted his part in this offense to the undersigned officer at the time of his arrest. He also admitted using a Metropolitan Police Officer's Badge #2591 during the commission of this offence. He further admitted stealing the badge #2591, from a police officer coat which was in the report writing room of the Third District Headquarters building.

The defendant (Dixon) assisted the arresting officer's in recovering all of the property that was taken in the Grand Larceny offense. As a result of the reliability and truthfulness of this defendant eight ladies rings with an approximate value of Twenty-three Hundred Dollars ($2,300.00) was recovered from several different persons and locations within the District of Columbia. The Metropolitan Police Department Badge #2591 was also recovered.

This defendant (Dixon) also related that on several different occasions, the latest being Thursday evening, January 20, 1971 that he saw two other Metropolitan Police Department Badges: one a Sergeant's badge, gold in color and the other an officer's badge, silver in color. He stated that he saw the badges in the bedroom, first floor of 6809 9th Street, Northwest, Washington, D.C.

He continued and related that the occupant of these premises, Jasper Lee Pressley showed him the badges, while in Jasper Lee Pressley's home, the defendant (Dixon) stated that he saw two typewriters. One, he was in the basement recreation room an IBM Electric, bluish green in color. The second typewriter was on the first floor of the same premises. The defendant (Dixon) continued and stated that Pressley and one Allen Colston both told him that the typewriters came from the office of the Pilot District Project.

The defendant (Dixon) and both Jasper Lee Pressley and Allen Colston all are employees of the Pilot District Project. The project is a Police Community Relations experimental program involving officers of the Third District and community residents of the District of Columbia. As a result of their employment, all three have access to certain areas within the Third District Headquarters and sub-station buildings and the offices of the Pilot District Project, 2101 16th Street, Northwest, Washington, D.C.

During the past year the employees of the Pilot District Project have reported a variety of articles stolen from the offices located at 2101 16th Street, Northwest, Washington, D.C. The latest articles reported stolen was one (1) selective IBM light green typewriter Serial #6238665, Friday, November 13, 1970 and Saturday, November 14, 1970 between the hours of 7:30 P.M. and 11:00 A.M. Complaint #587-947.

A check of the reports at the Third District shows that in complaint number 19634 that Sergeant Charles F. Klopfer, Third District reported his Sergeant's badge #S99 missing sometime between 4:00 P.M., on January 13, 1970 and 2:30 P.M. on January 14, 1970 somewhere in the vicinity of his home and the Third District Substation.

Also, under Complainant number 533-373 Officer Hugh F. Triggs, Third District reported that about 3:30 P.M. on October 17, 1970 his badge #2608 was stolen from his locker, from the basement of Third District Headquarters.

In view of the foregoing, the undersigned has probable cause to believe that the above described stolen property is presently located in the premise 6809 9th Street, Northwest, Washington, D.C. and therefore requests that a District of Columbia Superior Search Warrant issue authorizing the seizure of said property which is the Proceeds of a Crime.

/s/ Richard A. Hayden
RICARD A. HAYDEN
Plainclothesman,
Third District,
Metropolitan Police
Department

Subscribed and sworn to before me this Feb. 1, 1971.

/s/ [Illegible]
Judge,
D.C. Superior Court

EXHIBIT B

[Filed Jul. 9, 1973, James F. Davey, Clerk]

OF THE
DISTRICT OF COLUMBIA

Holding a Criminal Term
Grand Jury Sworn in on February 1, 1971

Criminal No.

THE UNITED STATES OF AMERICA

v.

JASPER C. PRESSLEY

Violation: 22 D.C. Code 2201, 2206, 2205

(Grand Larceny; Larceny from the District of Columbia; Receiving Stolen Property)

The Grand Jury charges:

FIRST COUNT:

On or about November 13, 1970, within the District of Columbia, Jasper C. Pressley stole property of the Pilot District Project, an agency of the District of Columbia Government, of the value of about $495.00, consisting of one typewriter of the value of $495.00.

SECOND COUNT:

On or about November 13, 1970, within the District of Columbia, Jasper C. Pressley did steal the said property of the District of Columbia, a Municipal Corporation, having a value of $495.00, consisting of one typewriter of the value of $495.00.

THIRD COUNT:

On or about November 13, 1970, within the District of Columbia, Jasper C. Pressley with intent to defraud, received one typewriter, property of the District of Columbia Government, which had been stolen knowing and having cause to believe the said property had been stolen.

/s/ Thomas A. Flannery
Attorney for the United
States in and for the District
of Columbia

A True Bill:

/s/ [Illegible]
Foreman
Notary Public

EXHIBIT C

[Filed Jul. 9, 1973, James F. Davey, Clerk]

SUPERIOR COURT
OF THE
DISTRICT OF COLUMBIA

Holding a Criminal Term

Grand Jury Sworn in on February 1, 1971

Criminal No. 9227-71

THE UNITED STATES OF AMERICA

v.

JASPER C. PRESSLEY, RUDOLPH PORTER, BETTY J. SMITH

Violation: 22 D.C. Code 502

(Assault With a Dangerous Weapon)

The Grand Jury Charges:

On or about February 5, 1971, within the District of Columbia, Jasper C. Pressley, Rudolph Porter and Betty J. Smith assaulted Roman S. Dixon with dangerous weapons, that is, a pistol and a screwdriver.

/s/ Thomas A. Flannery
Attorney of the United
States in and for the District
of Columbia

A TRUE BILL:

/s/ [Illegible]
Foreman

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed Jul. 12, 1973, James F. Davey, Clerk]

Habeas Corpus Number 30-73

JASPER C. PRESSLEY, PETITIONER

v.

C. L. SWAIN, RESPONDENT

ANSWER TO THE REPLY OF PETITIONER

Comes now the respondent by his attorney, the United States Attorney for the District of Columbia, and makes the following answer to the *Reply of Petitioner* filed by his court-appointed counsel.

1. The background of this case is set out in respondent's Supplemental Return and Answer to Rule To Show Cause filed on June 6, 1973. That pleading was filed in response to petitioner's *pro se* motion filed on May 23, 1973. *Reply of Petitioner* was filed on July 9, 1973 by his court appointed counsel.

2. With respect to the issue of whether the United States District Court for the District of Columbia has jurisdiction to entertain a collateral attack on a judgment of the Superior Court by habeas corpus or otherwise, petitioner's position appears to be that once a person convicted in the Superior Court applies for vacation of his conviction to the sentencing court, is rejected, and thereafter loses on appeal, he may apply to the United States District Court for a writ and relitigate the same issues there. The law with respect to federal habeas corpus is otherwise. As a general rule, the right to a writ of habeas corpus in the federal system accrues only where there is no remedy available in a local court and not because the petitioner has failed to prevail in the local court. Furthermore, Congress, in the District of Columbia Court Reorganization Act of 1970, has

vested exclusive post-conviction collateral review of Superior Court convictions in the sentencing court.

3. In another recent habeas corpus matter in this court, the same jurisdictional issue was raised. *Palmore* v. *Superior Court, et al.*, Habeas Corpus Number 31-73. Attached hereto is the memorandum of law filed by the United States in that case which the government submits here in support of its position with respect to jurisdiction.

4. As to the merits of his claims, petitioner's contention that he was denied effective assistance of counsel at trial since counsel failed to move to suppress or otherwise object to the admission of a typewriter into evidence was heard by the District of Columbia Court of Appeals and his conviction was affirmed. Number 6631, decided March 2, 1973.

Likewise, petitioner's allegation that a principal government witness, Roman C. Dixon, committed perjury was the subject of another appeal to the District of Columbia Court of Appeals and petitioner's conviction was affirmed. Number 6063, decided May 22, 1972.

Again petitioner's third point, an allegation of the impropriety in the indictment charging petitioner was the subject of yet another appeal in the District of Columbia Court of Appeals. Petitioner's conviction was upheld. Number 6803, decided July 6, 1973.

WHEREFORE, it is respectfully submitted that the rule to show cause be discharged and that the petition be dismissed.

/s/ Harold H. Titus, Jr.
HAROLD H. TITUS, JR.
United States Attorney

/s/ Earl J. Silbert
EARL J. SILBERT
Principal Assistant U.S. Attorney

/s/ Oscar Altshuler
OSCAR ALTSHULER
Assistant United States Attorney

/s/ Tobey W. Kaczensky
TOBEY W. KACZENSKY
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing answer to the reply of petitioner has been delivered to appointed counsel for petitioner, Glenn L. Archer, Jr., 888 17th Street, N.W., Washington, D.C. 20006, this 12th day of July, 1973.

/s/ Tobey W. Kaczensky
TOBEY W. KACZENSKY
Assistant United States Attorney

• • • •

[The Petitioners' *Memorandum of Law* to their *Return and Answer to Order to Show Cause* filed in the *Palmore* case on June 4, 1973, which was appended to this *Answer and Reply* filed by Petitioner Swain, is included on pages 29-42 of this Appendix and therefore has been omitted here.]

[Transcript of Hearing on Writ of Habeas Corpus]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Habeas Corpus No. 30-73

[Filed Feb. 3, 1975, James F. Davey, Clerk]

JASPER C. PRESSLEY, PETITIONER

v.

C. L. SWAIN, RESPONDENT

Washington, D.C.
July 16, 1973

The above-entitled cause came on for Hearing on Writ of Habeas Corpus before the HONORABLE GERHARD A. GESELL, United States District Judge, at 9:30 a.m.

APPEARANCES:

GLENN L. ARCHER, Jr., Esq.,
MICHAEL C. DURNEY, Esq.,
Counsel for Petitioner

TOBEY W. KACZENSKY,
Assistant United States Attorney,
Counsel for Respondent

IDA Z. WATSON
Official Reporter
U.S. Court House
Washington, D.C.

COPY FOR:

COURT FILE

[3] PROCEEDINGS

THE CLERK: Habeas Corpus No 30-73, Jasper C. Pressley v. C. L. Swain. Mr. Glenn L. Archer and Mr. Tobey Kaczensky.

THE COURT: All right, I will hear from the Petitioner.

MR. ARCHER: May it please the Court, my name is Glenn Archer, Jr., and my associate is Michael C. Durney.

The case of Jasper C. Pressley here before the Court arose on a petition for the issuance of a writ of habeas corpus which was filed by the Petitioner pro se on May 11, 1975 in forma pauperis.

Following the Government's answer that was filed on May 21, 1973, Judge McGuire ordered the writ to issue and appointed me as counsel to represent the Petitioner.

The other pleadings in this case are the Government's supplemental answer, filed on June 6, 1973, the Petitioner's reply filed on July 9, 1973, and the Government's answer to Petitioner's reply filed on July 12.

To provide just a little background on this case, the Petitioner's house at 6809 Ninth Street, Northwest was searched on February 1, 1971 under a search warrant.

THE COURT: I have read the file. I am fully familiar with the case.

MR. ARCHER: Yes, Your Honor.

THE COURT: What is the preliminary matter you want [4] to bring up?

MR. ARCHER: There are two issues raised by the pleadings. In the Government's supplemental answer filed on June 6 there was a question raised of this Court's jurisdiction to hear a writ of habeas corpus in view of 23 District of Columbia Code.

THE COURT: 110.

MR. ARCHER: 110(g). The Government stated: A writ of habeas corpus shall not be entertained by any Federal Court if it appears that the applicant has failed to make a motion for relief to the sentencing Court.

Petitioner's reply pointed out that a petition had been filed pro se for a motion for new trial and we con-

tended that this should be construed as a motion to correct sentence and that the Petitioner should not be denied access to a writ of habeas corpus on a mere procedural technicality.

In the Government's answer to Petitioner's reply, filed on July 12, for the first time I think the Government brought out its principal contention here, by stating that the Section 110(g) of the D.C. Code vested exclusive post-conviction collateral review of Superior Court convictions in the sentencing Court.

The Government attached a memorandum of law which has been filed in the case of Roosevelt Palmore, Habeas Corpus 31-73, in this Court.

[5] We have obtained the Petitioner's brief in that case and we fully subscribe to the arguments that are presented therein, namely, that the Supreme Court—

THE COURT: I haven't seen the brief in that case filed by the Petitioner. I have seen the Government's brief, which accompanied its papers.

MR. ARCHER: Yes, I have with me this morning—

THE COURT: You are talking about Palmore?

MR. ARCHER: Yes. I have with me this morning the two Petitioner's briefs and I would like to submit them.

THE COURT: All right, hand them up.

MR. ARCHER: Incidentally, there is one page on that, Your Honor, that is not too legible and we would like to try to obtain a more legible copy for you and submit it to you, if we may. I think, also, maybe one line got cut off at the top of one of the pages, too.

THE COURT: I can read it.

You mean you want me to rely on the Advisory Committee Rules?

MR. ARCHER: No, there are two briefs.

THE COURT: The Advisory Committee Rules are not applicable. The Court is a member of the Advisory Committee and these rules are not designed to cover the District of Columbia situation.

MR. ARCHER: Sir, there is another brief. The one [6] on the Advisory Committee was filed as a supplement to the Petitioner's main brief there. We are really

relying on the arguments and the authorities in the main brief of Petitioner.

THE COURT: All right.

Do you want to proceed with your argument?

MR. ARCHER: Yes, sir. That is what we have on the jurisdictional point that was raised by the Government.

As to the merits of the petition for issuance of a writ of habeas corpus, the Petitioner's pro se petition is based on a series of alleged failures on the part of his trial counsel to act, which it is contended either separately or in the aggregate blotted out the essence of a substantial defense.

THE COURT: Wasn't that heard up through the Superior Court system?

MR. ARCHER: It was heard as to the failure to suppress evidence, Your Honor; and the argument was made that he had ineffective assistance of counsel for failure to suppress.

We have—

THE COURT: What other deficiencies do you find?

MR. ARCHER: There are two things we would like to point out in that connection: One, we do allege that there were other errors of trial counsel; and, secondly, we believe that the District of Columbia Court of Appeals applied an erroneous test in deciding the case on ineffective assistance of counsel.

[7] In their decision they said that the failure to suppress did not amount to professional incompetence. We believe that under the Bruce decision that the test is whether a substantial defense has been blotted out; and we believe that the criteria of the District of Columbia Court of Appeals is much more strict than what is required by the Bruce decision.

THE COURT: Well, as far as the other claims of inadequate assistance of counsel are concerned, shouldn't they first be ventilated through the Superior Court system before it comes over here? Assuming I have jurisdiction.

MR. ARCHER: Sir, I believe it has gone through—there was a motion for new trial and then on the appeal,

when that motion was denied, the question before the Court was whether there was ineffective assistance of counsel.

THE COURT: I don't have any record in front of me, do I? I don't have any record at all in front of me. I don't have the trial record in front of me. It is not in these papers. I don't know what the transcript shows.

I don't understand how it is contemplated that I could examine the issue.

MR. ARCHER: We can file, Your Honor, the transcript in the lower Court and the record on appeal.

THE COURT: I don't see any of those materials. If I had jurisdiction, I would have to see what happened at the trial. I don't have anything in front of me.

[8] Let me hear you on the jurisdictional point. Where do you think I get jurisdiction?

MR. ARCHER: Well, on the jurisdictional point, we believe that the—

Excuse me, just a minute. May I get a copy of that?

THE COURT: Yes. What is it that gives me jurisdiction?

MR. ARCHER: On the jurisdiction, the Solicitor General argued in the Palmore case, which is the earlier case to the one that this brief was filed in, when it went up to the Supreme Court, that the Court Reorganization Act of 1970 for this District of Columbia jurisdiction was the same as or the equivalent of a state statute.

Of course, in all states there is a right to file for a petitioner writ of habeas corpus to Federal District Court. According to the procedures that have been set up that have been satisfied—

THE COURT: His argument hasn't any significance. What the Solicitor General says up in the Supreme Court hasn't any significance. It is a question of what the statute says, isn't it?

MR. ARCHER: Well, we believe there is a constitutional question involved, if the statute is to be construed as the Government says it is construed. The reason for this is that the right to a writ of habeas corpus, we believe, under the [9] Supreme Court decisions, must

be available in a constitutional Article III Court, where the judges have tenure; and that the constitutional requirement in so far as the writ is concerned cannot be satisfied when your last resort is in an Article I Court, as the Superior Court and the D. C. Court of Appeals are.

These same arguments are presented in the Palmore case which is presently before Judge Waddy of this Court.

THE COURT: Has that been argued to him?

MR. ARCHER: I don't know, sir, whether it has been argued. The last brief was filed on June 21, 1973. Petitioner's supplemental memorandum, and I don't know whether it has been argued yet or not. Perhaps the Government attorney would know that.

MR. KACZENSKY: That case has been argued and presently waiting for Judge Waddy to render an opinion on that.

THE COURT: That means you would have us retry all cases tried in the Superior Court.

MR. ARCHER: I don't believe that is correct.

THE COURT: Isn't that what it means? It would mean that every Lorton—

MR. ARCHER: If there is a constitutional issue involved.

THE COURT: Well, every Lorton prisoner would claim that he didn't have adequate counsel; so we would take each case [10] and review whether he had adequate counsel.

Isn't that the practical effect of what you are suggesting?

MR. ARCHER: It could very well be the practical effect of it, Your Honor, but I believe from a constitutional—

THE COURT: Do we have enough judges here to do that, do you think?

MR. ARCHER: I don't know that.

THE COURT: They are running 16,000 cases a year.

MR. ARCHER: I don't know what the answer is to that, Your Honor, but the constitutional question in-

volved, I think, is indicated by the Supreme Court cases where there is at least—

THE COURT: They have a direct review to the Supreme Court, do they not, from Judge Reilly's Court?

MR. ARCHER: Yes, they do.

THE COURT: It is not a certiorari review, is it?

MR. ARCHER: You mean from the D.C. Court of Appeals?

THE COURT: Yes.

MR. ARCHER: I am not certain on that, whether it is certiorari or a direct appeal.

THE COURT: I don't have any facts in this petition which—if I did have jurisdiction—would warrant me to grant the writ. Apart from that, you want a determination as to whether or not this Court has jurisdiction.

[11] Perhaps the way to proceed is for me to hear the Government on that issue and decide it one way or the other; and then if I decide I have jurisdiction, give you the opportunity to—

MR. ARCHER: To file with the Court the trial record.

THE COURT: —file the record, so I could determine the underlying issue. But if I don't have jurisdiction, there is no point in doing that.

MR. ARCHER: That is correct.

THE COURT: You simply say that regardless of what the statutes may or may not provide, that the Constitution provides that the writ shall be available and that it is available only in a constitutional court; and that if the Act contemplated taking it away in this particular instance, that that, in itself, is an unconstitutional provision.

MR. ARCHER: That is correct. And there is still a provision in the United States Code which permits writs of habeas corpus to District Court from a state jurisdiction. And, of course, the Supreme Court, in the earlier Palmore case, did adopt the Solicitor General's argument that the Reorganization Act in the District of Columbia was the equivalent of a state court system.

THE COURT: I think I have your position. Thank you, Mr. Archer.

MR ARCHER: If I could take one more minute, [12] Your Honor. We have pointed out in our reply two other alleged failures on the part of the trial counsel, in addition to the motion to suppress. One is a potential faulty indictment; and the other is potentially perjured testimony of the principal Government witness who we believe was essential to any conviction.

We believe that these are something more than just bad trial tactics or improvident actions on the part of the trial attorney in not raising these issues before the trial court; and we believe that had any one of them be successful before the trial court, they would have changed the outcome of the trial.

THE COURT: Well, those you haven't raised in the other Court, right?

MR. ARCHER: Well, they have been raised in other proceedings. The question of perjured testimony—

THE COURT: Was that reviewed on appeal in the other Court?

MR. ARCHER: Yes.

THE COURT: What did they hold?

MR. ARCHER: Excuse me just a moment.

THE COURT: What did they hold?

MR. ARCHER: Well, in each case there was just affirmance of the lower court per curiam without any real discussion of these issues.

[13] THE COURT: You have the motion to suppress, the perjury; and what was the third?

MR. ARCHER: And the potential faulty indictment.

THE COURT: What is the potential faulty indictment?

MR. ARCHER: There was another indictment issued the same day as the one that was involved in Mr. Pressley's case against Mr. Pressley; and on the face of the indictment the signature of the then United States Attorney, Mr. Flannery, is materially different and there is no indication that there was any authority—that it was signed by anyone else in authority; and we believe that a question should have been raised at the trial as to whether the indictment were proper

in view of the obvious difference in the sigatures of the United States Attorney.

THE COURT: Who was the trial counsel?

MR. ARCHER: Mr. Fink, Mr. Jules Fink.

THE COURT: All right, I have the three points.

MR. ARCHER: All right, thank you very much.

MR. KACZENSKY: Good morning, Your Honor. My name is Tobey Kaczensky, representing the United States in this matter and particularly representing Mr. C. L. Swain, who is the Superintendent of the Lorton Reformatory, who is a D.C. official.

As Your Honor may understand, our position is that the jurisdictional matter in this case and all others is critical [14] because if what Mr. Archer for Mr. Pressley suggests is true, instead of a more efficient Court system, a less encumbered system, we will have a far more complex system than we had before the Court Reorganization Act.

THE COURT: If we don't already have it.

MR. KACZENSKY: If we don't already have it.

Our suggestion is that the purpose was to eliminate a double appeal in the Court Reorganization Act. As Your Honor well knows, an appeal to the District Court of Appeals—

THE COURT: What about the constitutional point?

MR. KACZENSKY: The Constitution says that Congress shall not suspend the writ of habeas corpus. They have not suspended the writ of habeas corpus. They have made specific provision for it.

THE COURT: Don't you think denying it might be suspending it?

MR. KACZENSKY: Mr. Pressley, or anybody situated like him, is not denied a writ of habeas corpus. He has the D.C. Code which permits him to file over there. The question is, of course, whether the Superior Court and the D.C. Court of Appeals are constitutional courts.

With respect to that, in the first place, they have been set up by Congress; and as our pleadings further elucidate, there is nothing in the Constitution which indicates that Congress need set up any courts under

Article III. The question [15] is, if they didn't and had no other court set up, how would they provide for writ of habeas corpus.

THE COURT: Is Superior Court entertaining writs of habeas corpus?

MR. KACZENSKY: Indeed they are. Mr. Altshuler, who has been in business, so-called, for years, has had a number of writs directed at both Federal and D.C. officials and any sort of a problem, as Your Honor knows, may arise and are being entertained over there by the judges and relief or dismissal or whatever is appropriate is being issued in that court with the right of appeal. Our office is responding to the appeal or the Corporation Counsel.

THE COURT: So you would say the writ isn't suspended and that the statutory scheme was designed to keep the writ there and out of here?

MR. KACZENSKY: Indeed, and Congress has specifically provided in the D.C. Code for the opportunity to amend, to pursue the writ of habeas corpus, to question the legality of this custody.

In addition to that, it has, much like it did in 18 U.S. Code 2255, specifically provided in 23 D.C. Code 110 for a remedy which can raise collateral issues.

As Your Honor undoubtedly knows, many habeas corpuses filed in Federal Court were filed because the state courts lacked provision for a remedy. One of them, a glaring example, [16] was the effectiveness of counsel question. Many state courts—I think it has been improved over the years.

THE COURT: That remedy is available over in the Superior Court.

MR. KACZENSKY: Yes, it is. In short, Mr. Pressley has no difficulty in having his rights asserted and having his entire conviction reviewed on any point which is available in the United States Federal Court and he has a perfect right to go to the Supreme Court and have a final review of those issues. Congress has provided for that. They haven't suspended any constitutional right I am aware of, including specifically the right of habeas corpus.

As we argue in our memorandum, which will be the position we intended to take consistently before this Court, the Court Reorganization Act has the very sensible provision to divide jurisdiction between the two courts set up under the Constitution, Superior Court under Article I, District Court under Article III. Congress has provided for an efficient, fair system for the District of Columbia, very assiduously kept in mind all these problems that this Court and all other Federal Courts have become aware of over the years and provided for a reasonable and efficient court system to hear any and all claims.

Indeed, Mr. Pressley, as an example, has been treated, I would submit, as fairly as one could be. He has had three [17] appeals. Every issue that he has raised in his present motion has been thoroughly ventilated in the D.C. Court of Appeals. He has a right to appeal and he has not, to my knowledge, appealed any of those issues to the Supreme Court. He clearly has that right. He may go back to the trial judge, Judge Murphy, and either file a motion for new trial under 23-110, raising either any of these issues again or any other issue that may now appear to have merit.

THE COURT: As to the issues that have been resolved by the D.C. Court of Appeals, does the writ lie?

MR. KACZENSKY: No, I would submit it does not, under either the straight theory of jurisdiction in the Congress—

THE COURT: Or under the law of habeas corpus.

MR. KACZENSKY: Or under the law of habeas corpus.

If Your Honor was sitting in Virginia, over in Alexandria or Arlington court, Your Honor would, upon proper pleadings, I submit, have no choice but to feel he lacked jurisdiction. It is not whether he wins or loses; it is whether he has got a remedy available; and he clearly has a remedy available even if you took the state court Federal Court parallel, which I submit is not proper.

Indeed, Palmore is important. It didn't reach this issue but it did indicate in the Roman numeral 2 section of its opinion that reference to state statute would not ordinarily include the provisions of the District of Columbia Code; and [18] they indicate that the District of Columbia is constitutionally distinct from the states, so the state-Federal parallel doesn't apply. Although there hasn't been a firm, crystal clear holding, I think it is fairly apparent that you do have a state-Federal situation in any case.

Therefore, I should submit that this Court lacks jurisdiction. With respect to the merits, we would rely entirely on the record in the D.C. Court of Appeals. We think that—

THE COURT: Well, the merits really aren't before me. I don't have any record.

MR. KACZENSKY: That is correct. At any rate—

THE COURT: I came on the bench with the idea of saying that the Court had no jurisdiction. I do want to read those news papers that Mr. Archer has handed up, which I have not read.

I will file a memorandum in the next two or three days.

MR. KACZENSKY: Thank you very much, Your Honor.

THE COURT: Thank you, gentlemen.

MR. ARCHER: May I approach the bench on something else?

THE COURT: Another matter?

MR. ARCHER: This has to do with the release of Mr. Pressley. We were advised if you advised the Marshals that Mr. Pressley could be released because he is on furlough. Otherwise he will have to go back to Lorton.

[19] THE COURT: I don't know anything about that.

MR. ARCHER: I have his furlough papers here.

THE COURT: I think he had better go back to Lorton and be released from Lorton.

(Whereupon the hearing was concluded.)

CERTIFICATE OF COURT REPORTER

I, Ida Z. Watson, certify that I reported the proceedings in the above-entitled cause on July 16, 1973 and that the foregoing Pages 1 to 19, inclusive, constitute the official transcript.

/s/ Ida Z. Watson

DISTRICT OF COLUMBIA
COURT OF APPEALS

JANUARY TERM, 1972

[District of Columbia Court of Appeals, Filed May 22, 1972, Alexander L. Stevas, Clerk]

No. 6063

6733-71-A-B

JASPER C. PRESSLEY, APPELLANT,

v.

UNITED STATES, APPELLEE.

Appeal from the Superior Court of the District of Columbia, Criminal Division

BEFORE: Hood, Chief Judge, Kern and Gallagher, Associate Judges.

JUDGMENT

This case came on to be heard upon the record of the Superior Court of the District of Columbia and was briefed and argued by counsel.

On consideration whereof, and after review of the record and briefs, the Court is of the opinion that the record discloses no error affecting the substantial rights of appellant. D.C. Code 1967, § 11-721(e) (Supp. IV, 1971).

Accordingly, it is this 22nd day of May, 1972,

ORDERED and ADJUDGED that the judgment be, and it hereby is, affirmed.

PER CURIAM.

FOR THE COURT:

/s/ Alexander L. Stevas,
ALEXANDER L. STEVAS,
Clerk.

Copies to:

Honorable Tim C. Murphy
Judge, Superior Court of the District of Columbia.

Clerk, Superior Court of the District of Columbia.

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Assistant United States Attorney
Attorney for Appellee.

DISTRICT OF COLUMBIA
COURT OF APPEALS

JANUARY TERM, 1973

[District of Columbia Court of Appeals, Filed March 2, 1973, Alexander L. Stevas, Clerk]

No. 6631

6733-71-A-B

JASPER C. PRESSLEY, APPELLANT,

v.

UNITED STATES, APPELLEE.

Appeal from the Superior Court of the District of Columbia, Criminal Division

BEFORE: Kern and Harris, Associate Judges, and Hood, Chief Judge, Retired.

JUDGMENT

This is an appeal from the trial court's denial of appellant's motion for a new trial after his conviction for grand larceny and larceny from the government was affirmed by this court's judgment entered in May 1972. *Pressley* v. *United States*, D.C.App., No. 6063.

Appellant argues that the decision of his trial counsel not to move to suppress the typewriter seized by police from his residence pursuant to a search warrant constituted such gross incompetence as "blotted out" the essentials of his defense at trial. *See Bruce* v. *United States*, 126 U.S.App.D.C. 336, 340, 379 F.2d 113, 117 (1967); *Scott* v. *United States*, D.C.App., 259 A.2d 353, 354 (1969). Appellant vigorously contends (Br. at 4) that a suppression motion "could have been based upon lack of probable cause for issuance of a search warrant and on improper execution of said warrant" because (1) the affidavit in support of the warrant was

based upon information supplied by an informant whose credibility and reliability did not meet the test set forth in *Aguilar* v. *Texas*, 378 U.S. 114 (1963), and (2) the serial number of the typewriter seized differed from the serial number contained in the affidavit in support of the search warrant.

We are not persuaded, despite the forceful and thorough argument presented on behalf of appellant, that his counsel's determination not to move to suppress the typewriter constituted professional incompetence. *See Harried* v. *United States*, 128 U.S.App.D.C. 330, 335, 389 F.2d 281, 286 (1967). The affidavit contained specific and detailed information given by a named person who had returned to the police earlier certain property he himself had stolen. It also contained the purported serial number of the most recently stolen typewriter. Thus, we see no violation of the requirements of *Aguilar*. *United States* v. *Harris*, 403 U.S. 573, 583-84 (1971). The warrant itself did not contain a serial number. The discrepancy between the serial number in the affidavit and the one on the IBM typewriter seized resulted from a "calling" error on the part of the District of Columbia agency reporting the machine's theft to police, and the officer executing the warrant verified directly with the agency itself during execution of the warrant the correct number of the missing typewriter and matched it against the number of the typewriter seized. Certainly the executing officer was not required to ignore items which he had probable cause to believe had been stolen. *United States* v. *Yates*, D.C. App., 279 A.2d 516, 517 (1971).

Accordingly, it is this 2nd day of March 1973,

ORDERED and ADJUDGED that the denial of the motion is affirmed.

PER CURIAM.

FOR THE COURT:

/s/ Alexander L. Stevas,
ALEXANDER L. STEVAS,
Clerk.

Copies to:

Honorable Tim Murphy
Judge, Superior Court of the District of Columbia

Clerk, Superior Court of the District of Columbia.

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Attorney for Appellant.

John A. Terry, Esquire
Assistant United States Attorney
Attorney for Appellee.

DISTRICT OF COLUMBIA
COURT OF APPEALS

JANUARY TERM, 1973

[District of Columbia Court of Appeals, Filed July 6, 1973, Alexander L. Stevas, Clerk]

No. 6803

6733-71-A-B

JASPER C. PRESSLEY, APPELLANT

v.

UNITED STATES, APPELLEE

Appeal from the Superior Court of the District of Columbia, Criminal Division

BEFORE: Kern and Harris, Associate Judges, and Hood, Chief Judge, Retired.

JUDGMENT

Appellant filed in the trial court a "Motion for Production of Grand Jury Voting in Case Number 6733-71" some 16 months after he had been indicted and some 13 months after he had been convicted in that particular case.[1] The present appeal is from the trial court's denial of his Motion.[2]

Appellant urges that the grand jury "voting records" should have been made available to him in order to determine whether 12 or more grand jurors had voted to

[1] This court affirmed appellant's conviction by an unpublished judgment. *Pressley* v. *United States*, D.C.App., (No. 6063, May 22, 1972).

[2] Although appellant at the time of filing this Motion had an appeal pending in this Court, the trial court had jurisdiction to deny such motion. *See Franklin* v. *United States*, D.C.App., 293 A.2d 279, 280 (1972); *King* v. *United States*, D.C.App., 271 A.2d 556, 558-59 (1971).

indict him. After consideration of the record and appellant's arguments on brief and orally we are of opinion that his contention that he is now entitled to the Grand Jury's vote many months ago is without merit and his Motion was properly denied. Super. Ct. Cr. R. 12(b).

Accordingly, it is this 6th day of July 1973,

ORDERED and ADJUDGED that the judgment is affirmed.

PER CURIAM.

FOR THE COURT:

/s/ Charles J. Rumsey,
CHARLES J. RUMSEY,
Chief Deputy Clerk.

Copies to:

Honorable Tim Murphy
Judge, Superior Court of the District of Columbia.

Clerk, Superior Court of the District of Columbia.

Roger Frankel, Esquire
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Attorneys for Appellant.

John A. Terry, Esquire
Assistant United States Attorney
Attorney for Appellee.

III. *Order in Respect to Both Cases*

SUPREME COURT OF THE UNITED STATES

No. 75-811

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA, ET AL., PETITIONERS

v.

ROOSEVELT F. PALMORE; and

C. L. SWAIN, SUPERINTENDENT, LORTON REFORMATORY, PETITIONER

v.

JASPER C. PRESSLEY

ORDER ALLOWING CERTIORARI. Filed February 23, 1976

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1976 205074 240